Building global antitrust policy : law and politics

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BUILDING GLOBAL ANTITRUST POLICY: *LAW AND POLITICS*

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The law is stated as of December 2000. However, some additional materials and comments obtained in January 2001 are included where necessary.

ABBREVIATIONS

Am. Econ. Rev.	American Economic Review
Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int'l L.	American Journal of International Law
Am.U. L. Rev.	American University Law Review
Antitrust Bull.	Antitrust Bulletin
Antitrust L. J.	Antitrust Law Journal
Antitrust Rep.	Antitrust Report
Aus. J. Corp. L.	Australian Journal of Corporate Law
B. U. L. Rev.	Boston University Law Review
Brit. Y. B. Int'l L.	British Yearbook of International Law
Brookings L. Rev.	Brookings Law Review
Brooklyn J. Int'l L.	Brooklyn Journal of International Law
Bus. Law.	Business Lawyer
CFI	European Court of First Instance
C. L. P.	Current Legal Problems
Calif. Western Int'l L. J.	California Western International Law Journal
Canada-United States L. J.	Canada-United-States Law Journal
Cardozo L. Rev.	Cardozo Law Review
Case W. Res. J. Int'l L.	Case Western Reserve Journal of International Law
Chi-Kent L. Rev.	Chicago-Kent Law Review
CMLR	Common Market Law Reports
CMLRev.	Common Market Law Review
Columbia J. Trans. L.	Columbia Journal of Transnational Law
Columbia L. Rev.	Columbia Law Review
Const. Pol. Econ.	Constitutional Political Economy
Corn. Int'l L. J.	Cornell International Law Journal
Corn. L. Rev.	Cornell Law Review
Denvor J. Int'l L. & Pol'y	Denvor Journal of International Law and Policy
EC Comp. Pol'y NewsL.	EC Competition Policy NewsLetter
ECJ	European Court of Justice
ECLR	European Competition Law Review
ECR	European Court Reports
E. J. Pol. Res.	European Journal of Political Research
ELRev.	European Law Review
East Eur. Const. Rev.	East European Constitutional Review
Eur. Counsel	European Counsel
Fed. B. News & J.	Federal Bar News and Journal
Fordham Corp. L. Inst.	Fordham Corporate Law Institute
Fordham L. Rev.	Fordham Law Review
Fordham. Int'l L. J.	Fordham International Law Journal
Geo. Mason L. Rev.	George-Mason University Law Review
Geo. L. J.	Georgetown Law Journal
Global Comp. Rev.	Global Competition Review
Harv. Int'l L. J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review

Hastings Int'l & Comp. L. Rev.	Hastings International and Comparative Law Review
Hastings L. J.	Hastings Law Journal
I. C. J.	International Court of Justice
Int'l & Comp. L. Q.	International and Comparative Law Quarterly
Int'l Bus. Law.	International Business Lawyer
Int'l Ins. L. Rev.	International Institute Law Review
Int'l Law.	International Lawyer
Int'l Organization	International Organization
Irish J. E. L.	Irish Journal of European Law
Israel L. Rev.	Israel Law Review
J. Inst. & Theo. Econ.	Journal of Institutional and Theoretical Economy
J. W. T. L.	Journal of World Trade Law
J. C. M. S.	Journal of Common Market Studies
J. Int'l Stud.	Journal of International Studies
J. Law & Econ.	Journal of Law and Economics
J. Marshall L. Rev.	John Marshall Law Review
L. Q. R.	Law Quarterly Review
Law & Pol'y Int'l Bus.	Law and Policy in International Business
Legal Stud.	Legal Studies
Loyola L. Rev.	Loyola Law Review
M. L. R.	Modern Law Review
Marquette L. Rev.	Marquette Law Review
Mich. L. Rev.	Michigan Law Review
Mich. J. Int'l L.	Michigan Journal of International Law
Minn. J. Global. Trade	Minnesota Journal of Global Trade
N. I. L. Q.	Northern Ireland Legal Quarterly
N. Y. U. L. Rev.	New York University Law Review
New Eng. L. Rev.	New England Law Review
Nw. U. L. Rev.	Northwestern University Law Review
Nw. J. Int'l L.& Bus.	Northwestern Journal of International Law and Business
OJ	Official Journal of the EC
Ohio Northern U. L. Rev.	Ohio Northern University Law Review
Ohio State L. J.	Ohio State Law Journal
Ox. Rev. Econ. Pol'y	Oxford Review of Economic Policy
P. C. I. J.	Permanent Court of International Justice
Pac. Rim L. & Policy J.	Pacific-Rimely Law and Policy Journal
Quar. J. Econ.	Quarterly Journal of Economics
R. D. C.	Receuil des Cours
Rutgers L. Rev.	Rutgers Law Review
S. Cal. L. Rev.	Southern California Law Review
Stan. J. Int'l L.	Stanford Journal of International Law
Suffolk Transnational. L. J.	Suffolk Transnational Law Journal
Sup. Ct. Rev	Supreme Court Review
Swiss Rev. Int'l Comp. L.	Swiss Review of International Competition Law
Syracuse J. Int'l L. & Com.	Syracuse Journal of International Law and Commerce
Tex. L. Rev.	Texas Law Review
Transnational Law.	Transnational Lawyer
U. C. Davis L. Rev.	University of California, Davis Law Review
U. Chi. L. Rev.	University of Chicago Law Review
U. Chi. Legal F.	University of Chicago Legal Forum

U. Cinn. L. Rev.	University of Cincinnati Law Review
Univ. Fla. L. Rev.	University of Florida Law Review
U. Penn. L. Rev.	University of Pennsylvania Law Review
U. Pitt. L. Rev.	University of Pittsburgh Law Review
Uni. Penn. J. Int'l Bus. L.	University of Pennsylvania Journal of International Business Law
Univ. Penn. J. Int'l Econ. L.	University of Pennsylvania Journal of International Economic Law
Vand. L. Rev.	Vanderbilt Law Review
Villanova L. Rev.	Villanova Law Review
Virginia J. Int'l L.	Virginia Journal of International Law
Wayne L. Rev.	Wayne Law Review
World Comp.	World Competition
Y. E. L.	Oxford Yearbook of European Law
Yale L. J.	Yale Law Journal

ABSTRACT OF THESIS

This thesis is an examination of the internationalization of antitrust policy, a topic of great contemporary significance and debate. The strategy adopted in the thesis has three different aims. The first aim, the basic aim on which all else depends, is to expand the way into the jungle of the internationalization of antitrust policy. The second is to open up issues in the discourse between law and politics in this area that seem susceptible to further research and thinking. Finally, the third aim is to formulate an approach and to try to lay down some foundations on which the present thesis, as well as future study whether academic or otherwise, can be constructed.

The thesis is structured as follows. Chapter 1 gives a general introduction to the thesis. It states the purposes of the thesis. It also gives, *inter alia*, an account of the different examples of internationalization as well as an explanation of the terminology used in the thesis. Chapter 2 clarifies some central concepts and ideas. It explains the concept of competition and its economic understanding. Chapter 3 examines the goals of antitrust law and its political perception. Chapter 4 considers the use of discretion by antitrust authorities and how this affects the internationalization of antitrust policy. Chapter 5 constructs a framework of different theories which can help understand the process of internationalization and how can an international system of antitrust be constructed. Chapter 6 examines the antitrust experience of the EC. Chapters 7 and 8 respectively examine the doctrines of sovereignty and extra-territoriality. Chapter 9 deals with the relations between antitrust and trade policies. Chapter 10 gives an account of the past, present and future of the internationalization of antitrust policy from a comparative perspective. It examines, *inter alia*, the perspectives of states, international organizations, the business community and the consumer. Finally, chapter 11 offers some concluding remarks.

The thesis is intended to be an original and empirical inquiry. The theory presented in the thesis is general, in the sense that it is not tied to any particular jurisdiction, but seeks to give an explanatory and a clarifying account of the internationalization of antitrust policy.

The thesis begins with refining some central concepts and ideas, including the concept of competition and antitrust law as well as an examination of the goals of the latter.

This is a central theme in the thesis which illustrates the need to build bridges between different disciplines – law, economics and political science – with respect to the internationalization of antitrust policy. This theme also contributes to understanding the process of internationalization and complements its underlying rules, principles and guiding policies.

The thesis concludes by reviewing the landscape of the internationalization of antitrust policy and asking what further developments can be expected to appear on the horizon. It will be suggested that the adopted approach in the thesis has much to commend it in a world of relentless globalization, where conflicts between different states and between states and multinational undertakings may make legal and political decisions regarding the process of internationalization more central.

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Chapter One

INTRODUCTION

The twentieth century witnessed a heated debate between capitalism and communism over the desirability of competition in the market place. The years preceding the last quarter of the century saw a tendency on the part of many nations to favour a tradition of exerting strict control over the planning and management of their domestic economies. Towards the end of the century however the scene began to change dramatically with a move on the part of those nations from monopolization to demonopolization and from state control and planning to liberalization and privatization. This important development has enormously contributed to the growing recognition that, on the whole, competition can be regarded as an effective tool for enhancing innovation, furthering economic growth and safeguarding the well being of nations. Remarkably, the debate seems to have settled in favour of the market mechanism, and this has enhanced the desirability of competition.

The growing recognition of the value of competition has been accompanied by a relentless process of globalization and a sharp increase in the removal of hindrances to the flows of trade and investment between nations.[1] It has also been accompanied by a considerable increase in the number of nations, which – particularly over the last two decades – have come to recognize not only the desirability of competition but also the need to protect it.[2] The law used to protect competition is commonly referred to as "antitrust law", or "competition law".[3] Today, nearly 90 nations have adopted some form of antitrust law and at least 25 others are in the process of developing

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[1] See A. Fiebig "A role for the WTO in international merger control" (2000) 20 *Nw. J. Int'l L. & Bus.* 233, at p 235.

The term "nations" for this purpose is taken to include the EC.

[2] See M. Palim "The world wide growth of competition law: an empirical analysis" (1998) 43 *Antitrust Bull.* 105.

[3] "Antitrust law" is the term used in the US. The term "Competition law" is a synonym used more commonly outside the US. The term "antitrust law", unlike the concept of "competition", encounters hardly any previous usage in the English language. See D. Gerber *Law and Competition in Twentieth Century Europe* (Oxford, 1998), at p 4, analyzing the translation of the term into other languages.

antitrust legislation.[4] Most of the laws of those nations share many common features. These include prohibitions on certain horizontal agreements between undertakings (such as cartels aiming at market sharing, price fixing etc.), certain vertical restraints and abuses of market power by powerful undertakings. In more than half of those nations, there is also a prohibition on anti-competitive mergers between undertakings.

In addition to these similarities, there are also many differences in definition, objectives, approach and alike. It is important at this point to give an account of some of these differences. First, there is a lack of consensus between nations with respect to the meaning that should be given to terms such as "competition" and "anti-competitive". Secondly, there is a debate regarding whether competition particularly needs antitrust law at all and whether it can be protected using other types of law and policy. In some nations the laws are referred to as laws against "restrictive trade practices". These laws may be more concerned with regulating how large undertakings use their market muscle than with removing hindrances to free market competition.[5] Thirdly, there are differences regarding the antitrust law traditions of nations and the degree of seriousness to which they enforce their antitrust laws,[6] especially when foreign undertakings may be the beneficiaries of enforcement actions. Some nations enjoy a tradition of vigorous enforcement of the law, but many do not. Some nations have a tradition of separation of antitrust law enforcement and decision-making from politics, but others do not. Some nations have a tradition of state control and planning, which in some cases has been disintegrating, and others have a strong tradition of liberalization and privatization. Fourthly, there is no agreement on the proper goals of antitrust law. The possibilities range from economic to social to political goals.[7] Fifthly, there is lack of agreement regarding the right

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[4] See D. Valentine "Antitrust in a global high tech-economy", paper delivered before the American Bar Association of the District of Columbia at the 8th National Forum for Women Corporate Council (April 30, 1999), available at <http://www.ftc.gov/speeches/other/dvatspeech.htm>. Also, see W. Rowley & N. Campbell "Multi-jurisdictional merger review-is it time for a common form filing treaty?", Appendix I in *Policy Directions For Global Merger Review*, a special report by the Global Forum for Competition and Trade Policy (1999).

[5] Report of the American Bar Association Sections of Antitrust Law and International Law and Practice on *The Internationalization of Competition Law Rules: Coordination and Convergence* (December, 1999).

[6] D. Gerber "Afterword: Antitrust and American Business Abroad revisited" (2000) 20 *Nw. J. Int'l L. & Bus.* 307, at p 312. Gerber believes that this is an important point because it causes uncertainty, creates incentives for undertakings to seek "havens" in which antitrust law enforcement is weak and therefore distorts competition. See further chapters 7 and 8.

institutional approach to protect competition. In some nations it is done administratively, whilst in others it is done judicially.[8]

These differences, as well as others which will become apparent in the discussion, are important and therefore cannot be ignored. The differences have been widened by the fact that in some nations, notably the US and the EC, antitrust law is well-developed and the policies underlying it are in a constant state of change and evolution, whilst in other nations antitrust law is just seeing the light of the day.[9]

Generally, a position of difference is not particularly healthy. The current challenge in global antitrust policy seems to be how one can move from a position of difference to a position of similarity. This is a challenge that is currently facing the antitrust communities of different nations. Those who have realized the existence of this challenge and the need to move closer to a position of similarity have been seeking ways to "internationalize" antitrust policy. However, even here differences have surfaced regarding how the "internationalization" should be viewed. At one end of the spectrum, some nations are "unilateralist" in their approach and thinking. Quite frequently, they are willing to export their antitrust laws into other jurisdictions, a factor which, as will be seen, can be problematic.[10] At the other end of the spectrum, other nations seem to believe that there is scope for creating some common order within antitrust law and policy. Here some nations have opted for a "bilateral",[11] some for a "regional" and some for a "pluralist" approach, whilst still others have proposed a "global" order. These alternatives stand in complete contrast to, whilst also offering greater benefits, than the unilateralist position as a matter of course. Between these two ends, some nations have opted for a mixture of these approaches.

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[7] See pp 38-45 *Post*.

[8] See J. Griffin "What business people want from a world antitrust code" (1999) 34 *New Eng. L. Rev.* 39, at p 44; C. Bellamy "Some reflections on competition law in the global market" (1999) 34 *New Eng. L. Rev.* 15, at pp 18-9.

[9] See W. Hannay "Transnational competition law aspects of mergers and acquisitions" (2000) 20 *Nw. J. Int'l L. & Bus.* 287, at p 287.

[10] See chapters 8 and 10.

[11] "Bilateral" is used to refer to the conclusion of bilateral agreements between states, in particular between their domestic antitrust authorities. See for example the agreement entered into between the EC and the US (September 23, 1991) OJ [1995] L-95/45 as corrected by OJ [1995] L-131/38, discussed at pp 99-101 *Post*.

I. THE SCOPE OF THE THESIS

The present thesis argues for a serious (perhaps even a fresh) consideration of antitrust policy and its place in the global economy. The need for this consideration arises in the light of several problems that seem to require attention. "The problems are: 1) national law, because of its bounds, cannot catch all the conduct that harms the nation's citizens; 2) at the other extreme, national law, because of its reach, regulates other nations' people and transactions and intrudes on other nations' prerogatives and order; 3) systems' laws clash; 4) nations lack vision when the problems are bigger than nations; and 5) nations are increasingly less representative of people and firms that reside within their borders but that produce, sell or buy in global markets. Therefore, people and firms that reside outside the borders are increasingly regulated without a voice."[12]

In other words, there is a need to consider antitrust policy within the global economy in light of market globalization,[13] the fact that antitrust policy enforcement by several antitrust authorities in the world has become international in recent years, that such enforcement triggers conflicts between nations and that gradually norms and expectations have developed around antitrust policy and have increased in importance and in geographical scope.[14]

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[12] E. Fox "Global problems in a world of national law" (1999) 34 *New Eng. L. Rev.* 11, at pp 11-2. See also Fiebig, at p 233, note 1 *Ante*; P. Muchlinski *Multinational Enterprises and the Law* (Blackwell, 1995), at p 384.

[13] The concept of globalization is susceptible to different meanings, depending on the context in which it is applied. The concept therefore may not be easy to define. In the present context, the concept is employed to refer to market globalization.

Globalization has been particularly fostered by advances in technology and the elimination of barriers hindering the flows of trade and investment between nations. In light of globalization, the number of antitrust policy matters that transcend national boundaries has been increasing. These matters relate to restrictive practices in areas of international nature such as air or sea transport, export cartels, international cartels, mergers and abuse of market dominance. See generally M. Walters *Globalization* (Routledge, 1995); J. Dunning *The Globalization of Business: The Challenges of the 1990s* (Routledge, 1993).

A recent press release by the World Trade Organization (WTO) has stated that the year 1998, for example, witnessed a $6.5 trillion of exports of merchandise and commercial services world-wide. (April 16, 1999), available at <http://www.wto.org>.

[14] Other reasons include the shortcomings of both bilateral agreements between antitrust authorities and the convergence of antitrust laws of different nations in addressing international antitrust issues. See chapters 9 and 10.

The strategy adopted in this thesis has three different aims. The first aim, the basic aim on which all else depends, is to expand the way into the jungle of internationalization of antitrust policy. The second is to open up issues in the discourse between law and politics of the internationalization of antitrust policy that seem susceptible to further research and thinking. Finally, the third is to formulate an approach and to try to lay down some foundations on which the present thesis, as well as future study on this topic whether academic or otherwise, can be constructed.

II. THE NATURE OF THE THESIS

The thesis examines the process of the internationalization of antitrust policy. It enquires into the nature of this process, whether it is a matter of law or politics (or both), and the direction in which this process should be focused.[15]

In examining the nature of internationalization, first the limits of antitrust law have to be outlined. It seems sensible to start with some basic concepts and to examine the point and goals of the law. It would be a fruitless exercise to discuss the law and politics of the internationalization of antitrust policy without having first enquired into the *raison d'être* and aims of the law. This, in turn, entails a further inquiry into how its doctrines have evolved and the nature of its ultimate impact upon public and private power, the structure and function of institutions and markets and the economic freedom of the individual.[16] This in itself is an inquiry into another thread of antitrust (in addition to law and economics): the role and influence of politics and the relevance of the principles of liberal democracy.[17] The significance of this thread can be illustrated in the following manner. Generally, political ideology and initiative

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[15] See further chapter 6.

[16] R. Bork *The Antitrust Paradox* (Basic books, 1978), at p 3.

[17] Political influence and the principles of liberal democracy are not identical. Although the principles of liberal democracy bear strong links to several issues with respect to the construction of an international system of antitrust, there remain other important issues that should be examined within a different framework. The question of sovereignty is an example in point. As chapter 7 shows, several threads of that question seem to have a wider implication that need to be evaluated within a wider framework than that of the principles of liberal democracy.

There has been little exposition of the potential importance of politics in explaining antitrust policy. A contributing factor towards this seems to be that economists chose first to determine to what extent economics, not politics, was a systematic factor in antitrust law enforcement. See chapter 2 for an examination of the role of economics and economists in antitrust policy.

serve as the basis for enacting different antitrust laws in different nations.[18] This is based on the view that underlying the concept of antitrust is a serious concern about excessive economic power, and a general awareness that the principles of liberal democracy may be undermined if market *economic democracy* is not afforded adequate protection.[19] As political ideology is crucial in the adoption of antitrust law in different jurisdictions, it is essential when examining the internationalization of antitrust policy to consider issues inherent in such ideology.[20] In particular, it is necessary to be aware that the regulation of competition and enforcement of antitrust law by administrative institutions can involve bureaucratic politics and bureaucratic decision-making. To an extent, the merits of antitrust law enforcement, whether national or regional (such as the case with the EC),[21] carry implications of political directions ordered by administrative and political institutions.

The nature of this inquiry opens up the need for new insights from various disciplines, including political science. These insights are valuable in order to understand the internationalization of antitrust policy and complement its rules, normative principles and guiding policies. It seems that lawyers and political scientists have a great deal of mutual interest in the internationalization of antitrust policy, which could be realized by constructing an adequate dialogue between the two disciplines.[22]

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[18] A. Fels & G. Edwards have argued that the enactment of antitrust law is a political act, and, as such, political factors should be given paramount consideration. See C. Ehlermann & L. Laudati (eds.) *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing, 1998), at p 58.

[19] It is important to emphasize that the present discussion is more concerned with economic democracy than political democracy.

According to Amato, antitrust law should be traced to the fight against restrictions on the freedom of individuals by economic power. See G. Amato *Antitrust and the Bounds of Power* (Hart Publishing, 1997), at p 96; H. Thorelli *The Federal Antitrust Policy: Origination of an Antitrust Tradition* (John Hopkins Press, Baltimore, 1954); E. Fox "The Modernization of antitrust: a new equilibrium" (1981) 66 *Corn. L. Rev.* 1140; E. Sullivan (ed.) *The Political Economy of the Sherman Act* (Oxford, 1991); D. Millon "The Sherman Act and the balance of power" (1988) 61 *S. Cal. L. Rev.* 1219.

[20] This is where rubber hits the road. The thesis will develop this proposition by demonstrating that the internationalization of antitrust policy is subject to political influence.

[21] See chapter 6.

[22] On constructing dialouges between different disciplines, see generally J. Weiler "Community, member states and European integration: is the law relevant?" (1982) 21 *J. C. M. S.* 39; R. Pryce *The Politics of the European Community* (Butterworths, 1973).

The present study bears a political science approach.[23] This approach is adopted because of the particular emphasis this study places on the importance of institutional dimensions and politics, including the way in which policy processes complement the law in this area. Thus, it is receptive to insights regarding the choice of methodology within political science and political regulation. To some extent, this emphasis reflects the need to develop an inter-disciplinary approach to the topic and the sense of importance of institutional endowments and their relevance to the internationalization of antitrust policy.[24] Generally, it seems that political scientists themselves have been very slow to undertake systematic work on antitrust policy, leaving this area to lawyers and economists.[25] It has been argued, however, that lawyers and economists "will periodically concede the importance of politics and of institutions, but will tend to proceed to analyse legal principles, economic models, and individual cases as in a vacuum, innocent of any systematic recognition of political acceptability or political bargaining".[26] Awareness of institutional and political dimensions can vastly contribute to understanding the internationalization of antitrust policy.

III. THE EXAMPLES OF INTERNATIONALIZATION

Several examples of the "internationalization" of antitrust policy may be identified. First, there is the idea of bilateral co-operation between different antitrust authorities around the world. Bilateral co-operation revolves around the enforcement of the domestic antitrust laws of the nations concerned. It can take the form of formal agreements between the domestic antitrust authorities of those nations which normally include, *inter alia*, provisions on information-sharing and comity.[27] Secondly, there is

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[23] Institutions have an important role to play in antitrust policy. The internationalization of antitrust policy makes the case for considering institutional dimensions particularly pressing.

[24] See M. Staniland *What Is Political Economy* (Yale University Press, 1985); D. North *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990); M. Granovetter "Economic action and social structure: the problem of embeddedness" in M. Granovetter & R. Swedberg *The Sociology of Economic Life* (Boulder: Westview Press, 1992).

[25] C. Doern & S. Wilks *Comparative Competition Policy* (Oxford, 1996), at p 4.

[26] *Ibid.*, at pp 4-5. The authors argue that their assertion is not intended to be dismissive of law and economics disciplines, or to imply that academic lawyers or economists invariably overlook political factors. They merely (and it seems rightly) emphasize "a systematic bias and an understandable, if regrettable, narrowness of viewpoint" on the part of either discipline.

[27] See for example the EC-US agreement (September 23, 1991) (OJ [1995] L-95/45 as corrected by OJ [1995] L-131/38), discussed at pp 99-101 *Post*. Other bilateral agreements have been entered into by different nations, including Canada, Australia and New Zealand. See chapters 8 and 9 for a discussion on these agreements.

the idea that domestic antitrust laws can converge towards some common points and standards.[28] The basic idea here is to harmonize the different antitrust laws of different nations. The third example involves creating a detailed international antitrust code to be adopted by nations.[29] A fourth example of internationalization focuses on establishing an international system of antitrust within a framework of autonomous international institutions.[30] Nations would apply the principles emerging from the system under the auspices of an independent antitrust authority. The system would also provide for a minimalist procedure with a mechanism to resolve disputes among participating nations. Arguably, this example is the most central, but certainly the most ambitious, of all four. It may be appropriate to note in passing that this list of examples is not meant to be exhaustive. However these are the four main, principal (and important) examples which have emerged over the years.

IV. SOME REFLECTION ON TERMINOLOGY

At this stage, a comment on the employment of terminology in the thesis would be appropriate.

(A) System of antitrust

Quite frequently reference will be made to a "system of antitrust". It is essential to explain this concept, which it is submitted, includes at least three different components.[31] First, there is the concept of competition itself, which is entrenched in

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[28] See chapter 6. Also, see pp 250-3 *Post*.

[29] See pp 253-4 *Post*.

[30] See the proposal put by the "Wise Men Group", a group of experts commissioned by K. van Miert former Commissioner for antitrust policy in the EC, "Competition policy in the new trade order: strengthening international co-operation and rules" COM (95) 359, available at <http://www.europa.eu.int>. The proposal is discussed in chapter 6.

[31] The concept of "system" is suitable to accommodate the three components concerned. The "system" functions as an operative whole, combining the interaction of its ideas and the factors influencing its operation. It is believed that a special relationship exists between these components, which will be explored at different levels in the thesis. The thesis will draw on the knowledge and insights of the disciplines to which these components belong to build an analytical framework in which they could be interwoven and therefore complement and enrich one another. See M. Dabbah "Measuring the success of a system of competition law: a preliminary view" (2000) 21 *ECLR* 369, at pp 370-1.

Note the employment of the concept by other writers. For example, Gerber uses the concept system to analyze how institutions interact with norms in relation to the protection of competition. According to Gerber, the concept thus becomes more specific and functional, and more analytically valuable, because it focuses on the characteristics and consequences of those interactions. Gerber, at p 4, note 3 *Ante*.

economics. The following chapter will demonstrate how the economic philosophy of competition has become its dominant intellectual discourse.[32] No study of antitrust law and policy which lacks appreciation for the role that competition plays within the market economy can be justifiable. As Dewey, in a characteristically trenchant style, remarked: before deciding what antitrust law ought to be, it is necessary to understand what the process of competition is really like.[33] Secondly, there is antitrust law which concerns applying a body of legal rules and standards to deal with market imperfections and restoring desirable competitive conditions in the market. The third component is antitrust policy,[34] which is anchored in politics. This deals with public authorities' intervention beyond certain market imperfections, such as market failures or "externalities".[35] The corollary of this provides that sovereign states are responsible for the formulation of different public policies, and public institutions possess *discretion* to ensure their implementation in practice. In Bork's view, antitrust law exemplifies one of the most elaborate deployments of governmental force in areas of life still thought primarily committed to private choice and initiative.[36]

(B) An international system of antitrust

In the present thesis, a distinction is made between a system of antitrust and an international system of antitrust. Such a system will inevitably be hybrid in nature. It is to be constructed not only on the basis of ideas originating at the national level, but also on the basis of understanding international politics and international economic issues. Constructing the system will also involve some appropriate recourse to principles of public international law. Finally, to avoid any likely confusion of terminology between this system and other systems (national/regional) of antitrust, the former will be referred to uniformly throughout this thesis as an international system of antitrust.

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[32] See Amato, at p 1, note 19 *Ante*.

[33] D. Dewey "The economic theory of antitrust: science or religion" (1964) 50 *Virginia L. Rev.* 413, at p 414.

[34] Note that the term "antitrust policy" has been given different interpretations in different jurisdictions and in different contexts. See WTO *Annual Report* (1997), at p 34.

[35] Market failure connotes the existence of circumstances in which private forces in the market fail to sustain "desirable activities" or to estop "undesirable activities". See F. Bator "The autonomy of market failure" (1958) 72 *Q. J. Econ.* 351.

[36] Bork, at p 3, note 16 *Ante*.

(C) The internationalization of antitrust policy

Another distinction is made between an international system of antitrust and the internationalization of antitrust policy. It is argued that an international system of antitrust can be ultimately constructed through the process of internationalization. The process of "internationalization" seeks to deal with issues, which seem to be vital in order to construct this system. The term "internationalization" is employed in this thesis, not only to highlight the need to accommodate the various national interests and decision processes into how international institutions are designed and politically justified, but also to refer to the actual penetration of international pressures into the concrete functioning of domestic institutions. These thoughts show that the process of internationalization functions as a "double-edge sword". They also result in legal, as well as political, implications for the internationalization of antitrust policy. Hence the inclusion of the words "law and politics" in the title. These implications will be explained and analyzed in the different chapters.

V. THE STRUCTURE OF THE THESIS

The thesis is structured as follows. Chapter 2 refines some concepts and ideas that are important to understand, including the concept of competition. Chapter 3 examines the goals of antitrust law and its political perception. Chapter 4 considers the use of discretion by antitrust authorities and how this affects the internationalization of antitrust policy. It will be argued that this use of discretion can lead to similar antitrust laws in different jurisdictions being radically different in their enforcement – a situation that often leads to divergence in the legal standards between those jurisdictions. Chapter 5 constructs a framework of different theories which can help to understand the process of internationalization of antitrust policy and how an international system of antitrust can be built. Chapter 6 examines the antitrust experience of the EC. Chapters 7 and 8 examine the doctrine of sovereignty and extra-territoriality respectively. Chapter 9 deals with the relationship between antitrust and trade policies. Chapter 10 gives an account of the past, present and future of the internationalization of antitrust policy from a comparative perspective. It examines, *inter alia*, the perspectives of states, international organizations, the business community and the consumer on the internationalization of antitrust policy. Finally, chapter 11 concludes.

* * *

This thesis is essentially an examination of the internationalization of antitrust policy, with a special reference to the law and politics thereof, as evidenced in the actions and statements of antitrust authorities, political bodies and decisions of law courts. To a great extent, the thesis can be seen as an original and empirical inquiry. The theory presented in the thesis is general, in the sense that it is not tied to any particular jurisdiction, but seeks to give an explanatory and a clarifying account of the internationalization of antitrust policy.

The thesis begins with refining some central concepts and ideas, including the concept of competition and antitrust law as well as an examination of the goals of the latter. This is a central theme in the thesis which illustrates the need to build bridges between different disciplines with respect to the internationalization of antitrust policy. This theme also contributes to understanding the process of internationalization and complements its underlying rules, principles and guiding policies.

The thesis concludes by reviewing the landscape of the internationalization of antitrust policy and asking what further developments can be expected to appear on the horizon. The recommended approach in the thesis has much to commend it in a world of relentless globalization, where conflicts between different states and between states and multinational undertakings may make legal and political decisions regarding the process of internationalization more central.

Chapter Two

REFINING SOME CONCEPTS AND IDEAS

This chapter gives a broad account of some central concepts and ideas. It is divided into three parts. Part I discusses the idea and concept of competition and its economic understanding. Part II provides some historical perspective of a particular political idea and political philosophy about antitrust law. Part III gives a brief conclusion.

I. THE CONCEPT OF COMPETITION

(A) The meaning of competition

It is desirable to clarify the meaning of competition at the outset, in order to facilitate a better understanding of its economic implications. The Oxford English Dictionary defines the term in the following way:

> "1. a. The action of endeavouring to gain what another endeavours to gain at the same time; the striving of two or more for the same object;
>
> b. Rivalry in the market, striving for custom between those who have the same commodities to dispose of . . ."[1]

As far as academic definitions of the concept are concerned, they do not seem to be identical. The definitions given by the following scholars can be used to illustrate this point. Whish states that:

> "Competition means a struggle or contention for superiority, and in the commercial world this means a striving for the custom and business of people in the market place."[2]

Goyder, on the other hand, opines that competition is:

> "The relationship that exists among any number of undertakings which sell goods or services of the same kind at the same time to an identifiable group of customers."[3]

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[1] (Oxford University Press, 1989), at pp 604-5. The writer's choice of dictionary should not be seen as capricious. It was chosen because of the speciality of definition. Compare with *Johnson's Dictionary of the English Language* and the *Concise Oxford Dictionary*.

[2] R. Whish *Competition Law* (Butterworths, 2001), at p 1.

[3] D. Goyder *EC Competition Law* (Oxford, 1998), at p 9.

From the above definitions, it can be gleaned that the term competition refers to:

1. The existence of both a process and a relationship;[4]

2. In a commercial sense, a close association with the concept of market place;

3. Having some aim or purpose.

It is submitted that competition connotes the existence of a process of rivalry between undertakings which, in the pursuit of self-interest, endeavour to win custom in the market.[5] Competition is structured first and foremost on the freedom to compete.[6] It is the flywheel of a free economy, the very expression of its spirit and both the cause and the result of its successful operation.[7] Because competition in the commercial world is concerned with the market place, it seems to be evolutionary in substance and dynamic in form.[8]

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[4] Whilst Whish based his definition on that appearing in the Oxford Dictionary, Goyder seems to have opted for a wider term to describe competition. Whish used the term "struggle", which connotes a "process" and is therefore the correct term to be employed. Goyder used the term "relationship", which is wide and normally used to describe different situations. In antitrust law, these situations may range from a vertical agreement between a supplier and a buyer, to joint dominance to tacit collusion. Hence, it is submitted that, though in the wide sense competition concerns a relationship, it is more appropriate to employ a term that would connote the existence of a process, since the term relationship falls short of offering a specific definition.

For an account of the "different meanings" of competition, see R. Bork *The Antitrust Paradox* (Basic books, 1978), at pp 58-61; *White Motor Co. v. US* 372 U.S. 253, 281 (1963).

[5] The thesis explains that competition is more than a relationship between market participants. Note in this regard how economists and lawyers view competition. Economists for example equate competition with impersonal price-making, the most impersonal being the "purest", whereas lawyers tend to view competition as rivalry among undertakings to sell goods or services. Despite these differences in the thinking of economists and lawyers however, both disciplines would view competition as a dialogue of challenge and response - a sequence of moves and responses between competing undertakings. See J. Clark *Competition As a Dynamic Process* (Brookings Institution, 1961), at pp 14-5; E. Mason "Monopoly in law and economics" (1937) 47 *Yale L. J.* 34.

[6] It has been argued that liberty of action ought not to be subjected to political influence. In some cases it is directed not restrained. Freedom, on the other hand, is not to be construed as liberty to cause harm or detriment. See H. Lutz *American Legal Writing During the Founding Era* (Liberty Press, 1983); M. Charleston *Rudiments of Law and Governments Deducted from the Law of Nature* (Library of Congress, 1783).

[7] See S. Khemani "Competition policy: an engine for growth" (1997) 1 *Global Comp. Rev.* 20, at p 23.

[8] The truth behind this statement can be deduced from the way competition has evolved into a "world" concept. International organizations, such as the WTO, have adopted the concept like an item of faith. In this way, competition has been associated with the process of market globalization and liberation. See WTO *Annual Report* (1997), ch 4; E. Fox "Competition law and the agenda for the WTO: forging the links of competition and trade" (1995) 4 *Pac. Rim L. & Policy J.* 1; E. Fox "Toward world antitrust and market access" (1997) 91 *Am. J. Int'l L.* 1.

(B) The function of competition

The definition of competition should be distinguished from the function which it is supposed to perform in the market place.[9] The function of competition can be illustrated by explaining two notions of competition. First, there is customary competition, which is seen as a dominant dynamic element and a regulatory-mechanism within the free market system. Its function within Smith's "invisible hand" of the market mechanism is to co-ordinate market deals and transactions. Secondly, there is dynamic competition.[10] According to this notion, competition is a continuing process, based on market innovation in which competitive advantages accruing from current market oligopolies or positions of market dominance are the outcome of past efficiencies and are readily available to be made use of by the undertakings concerned.[11] In this sense, theorists of dynamic competition are far less concerned about economic power and an unbalanced market structure than scholars of customary competition.[12]

These notions of competition aside, today it is generally thought that competition is desirable.[13] Economists in particular, have always argued in favour of the desirability

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[9] Whish, at p 1, note 2 *Ante*.

[10] Dynamic competition involves the idea of achieving an optimal degree of innovation and the diffusion of new technological advances over time. Such an emphasis on the aim of overall economic efficiency (as opposed to consumer welfare *per se*) has come to be known as the "total welfare approach". See P. Crampton "Alternative approaches to competition law: consumer's surplus, total welfare and non-efficiency goals" (1994) 17 *World Comp.* 55, at pp 55-86. Also, WTO *Annual Report* (1997), at pp 39-40.

This notion of competition can be contrasted with competition in a static sense, which connotes the existence of optimal allocation in resources in order to meet the demand side in the market, incurring the lowest possible cost at any given point in time.

[11] See P. Auerbach *Competition: The Economics of Industrial Change* (Oxford: Blackwell, 1988), at pp 22-7. See, however, the views of Schumpeter who emphasized the so-called creative gale of destruction, which shows that competition is not a given virtue as such. J. Schumpeter *Capitalism, Socialism and Democracy* (London: Allen & Unwin, 1976).

[12] Reference can be made here to scholars of "contestable markets" who argue that markets may not be highly competitive, but it is unlikely that undertakings will diverge in their economic behaviour than if the market were to be otherwise – as long as the market is "contestable", namely the likeliness potential competitors can easily enter and begin to compete when market imperfections provide the opportunity to do so. See W. Baumol, J. Panzar & D. Willig *Contestable Markets and the Theory of Industry Structure* (Harcourt Brace, 1988).

[13] Whish, at p 11, note 2 *Ante*.

of competition.[14] Hay has argued that a successful market economy depends on the existence of competition and an effective antitrust policy. This desirability seems to have been enhanced by several factors: first, monopoly does seem to lead to poor quality, restriction in output and harm to consumers; secondly, there is an incentive to achieve productive efficiency in a competitive market; thirdly, the suggestion that innovation is only possible in the case of monopoly has no foundation; fourthly, competition offers the consumer a greater degree of protection and choice.[15]

For the discipline of economics, economic efficiency and the maximization of consumer welfare are the underlying aims of antitrust law.[16] Traditionally, economic theory has presupposed that goods and services will be produced in the most efficient manner under circumstances of "perfect competition".[17] The idea behind this economic approach and understanding is intended to provide a simple test, which would be cognizable for most laymen.[18] In particular, the rules of "perfect competition" are intended to be quite simple to apply. Whish has argued that this test and the neo-classical analysis associated with it are seductive in their simplicity:

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[14] F. McChesney "In Search of the public interest model of antitrust" in F. McChesney & W. Shughart (eds.) *The Causes and Consequences of Antitrust: The Public Choice Perspective* (Chicago, 1995), at pp 25-32.

[15] D. Hay "The assessment: competition policy" (1993) 9/2 *Ox. Rev. Econ. Pol'y* 1. Contrasts this with certain twentieth century alternative economic thoughts, which seem to be competition-sceptics. These argue that competition considerations are not the only co-ordinating force within liberal markets, and that their dominance of the intellectual discourse of antitrust *is over developed*. They also contend that co-ordination of private economic behaviour is also possible via other terminals such as social collusion, the creation of collectivist norms and decisions and hierarchy and the virtues of social responsibility. See Auerbach, ch 2, note 11 *Ante*; G. Hodgson *Economics and Institutions* (Cambridge: Polity, 1988).

[16] Bork stated that "(1) [t]he only legitimate goal of American antitrust law is the maximization of consumer welfare; therefore, (2) 'Competition', for the purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decision". See Bork *Paradox*, at p 51. Bork also wrote that "Congress intended the courts to implement (that is to take into account in the decision of cases) only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction. This requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output". See R. Bork "Legislative intent and the policy of the Sherman Act" (1966) 9 *J. Law & Econ.* 7.

[17] See R. Lipsey & K. Chrystal *An Introduction to Positive Economics* (Weidenfeld & Nicolson, 1995); O. Williamson *Antitrust Economics* (Blackwell, 1987).

[18] See F. Scherer & D. Ross *Industrial Market Structure and Economic Performance* (Houghton Mifflin, 1990), chs 1 and 2; D. Swann *Competition and Consumer Protection* (Penguin, 1979), ch 3; Williamson, *Ibid*; Whish, ch 1, note 2 *Ante*.

> "If the sole function of competition law were the maximization of consumer welfare by achieving the most efficient allocation of resources and by reducing costs as far as possible, the formulation of legal rules and their application would be relatively simple. There would of course be the problem that such a policy would be essentially economic and that lawyers would have difficulties when asked to step outside their own discipline, but at least it would be possible to proceed by reference to some single, unifying aim."[19]

Attractive as this simplicity may be, several claims can still be advanced against this economic approach. First, the theory of conventional economic analysis suffers from ambiguity of definition and narrowness of viewpoint.[20] Secondly, it will be seen, in due course,[21] that economic efficiency and consumer welfare are far from being the only, or even dominant, goals of antitrust law.[22] Thirdly, economists do not seem to be able to craft viable rules suitable for the economic efficiency implications of particular market behaviour and structure.[23] At one end of the spectrum, there is the view that elements of market behaviour and structure may encompass the variability of economic undertakings, technological advances, commercial planning, strategies and markets; all of which makes it difficult in practice to devise suitable rules to address such issues. At the other end of the spectrum, stands the fact that different economic approaches speak of identical issues differently.[24] Fourthly, economists should not stray into imaginary domains about markets which enjoy "perfect

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[19] Whish, at pp 12-3, note 2 *Ante*.

[20] At some stage Bork, in contrast to what has been stated in note 16 *Ante*, appeared to recognize that US Congress intended to implement a broader spectrum of values than the neo-classical concept of consumer welfare in the enforcement of antitrust rules. See R. Bork "The role of the courts in applying economics" (1985) 54 *Antitrust L. J.* 2, at p 24.

[21] See pp 38-45 *Post*.

[22] The academic criticism of this goal is extensive. See P. Carstensen "Antitrust law and the paradigm of industrial organization" (1983) 16 *U. C. Davis L. Rev.* 487; E. Fox "The Modernization of antitrust: a new equilibrium" (1981) 66 *Corn. L. Rev.* 1140; E. Fox "The politics of law and economics in judicial decision making: antitrust as a window" (1986) 61 *N.Y.U.L. Rev.* 554; R. Lande "Wealth transfers as the original and primary concern of antitrust: the efficiency interpretations challenged" (1982) 34 *Hastings L. J.* 65; J. May "Antitrust practices in the formative era: the constitutional and conceptual reach of state antitrust laws, 1880-1918" (1987) 135 *U. Penn. L. Rev.* 495; L. Orland "The paradox in Bork's antitrust paradox" (1987) 9 *Cardozo L. Rev.* 115; R. Pitofsky "The political content of antitrust", (1979) 127 *U. Penn. L. Rev.* 1051; F. Rowe "The decline of antitrust and the dilution of models: the Faustian Pact of law and economics" (1984) 72 *Geo. L. J.* 1511; L. Schwartz "'Justice' and other non-economic goals of antitrust" (1979) 127 *U. Penn. L. Rev.* 1076; J. Flynn "Antitrust jurisprudence: a symposium the economic, political and social goals of antitrust policy" (1977) 125 *U. Penn. L. Rev.* 1182.

[23] Hay, at pp 6-12, note 15 *Ante*.

[24] Williamson, at p 315, note 17 *Ante*; Also on this issue, as far as industrial economists are concerned, see D. Hay "Competition policy", (1986) 2 *Ox. Rev. Econ. Pol'y* 1.

competition". This state of competition does not seem to be attainable.[25] Markets are disorganized in substance, complex in structure, and are far from being capable of generating any strains of "perfect competition".

Other claims which can be advanced are based on the fact that the aggregation of theories of "contestable markets" and the intellectual influence of Chicago School theories have, to a certain extent, undermined the conventional view on the desirability of competition.[26] The Chicago school of thought has been particularly prominent in supplying a great deal of the existing US antitrust ideology. The School's "successful" life span covers the last two decades.[27] Unlike neo-classicism theory, it advocates a more relaxed approach to antitrust policy.

In reality, the discipline of economics is subject to a pragmatic pressure to attack the most serious market failures, to construct principles of reasonable behaviour and to ultimately pursue a goal of "workable competition".[28] The concept of "workable competition" encompasses an idea that is different from a theory (it is generally wider). It operates like a norm that changes according to variation in economic theorem and the conditions and structure of the market, such as shifts in the behaviour of undertakings, the attitude of public institutions, causes and effects of market globalization and evolution in technological advances.

More recent American radical theorizing, however, transcends this position towards applying a new "public-choice" approach. McChesney and Shughart, for instance, have crafted a strategic path hoping to return the attention of antitrust scholars to first principles, forcing them to consider seriously whether competition or antitrust policy has any legitimate place in a market-based economy.[29] The "public-choice" approach

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[25] See Whish, at pp 4-6, note 2 *Ante*.

[26] Bailey "Contestability and the design of regulatory and antitrust policy" (1981) 71 *Am. Econ. Rev.*, at pp 178-183; Baumol, Panzar & Willig, note 12 *Ante*.

[27] See the review of the School's theoretical influence in W. Shughart "Be true to your school: Chicago's contradictory views of antitrust and regulation" in McChesney & Shughart, at pp 323-40, note 14 *Ante*.

[28] *Ibid.*, at pp 1-12.

[29] *Ibid.*, at p 330.

is interesting because of its views on the importance and role of states and institutional dimensions, domestic and international.[30]

(C) Competition and contextual economics

Awareness of fundamental economic theories is an essential step in evaluating various antitrust policy debates.[31] Frequent and infrequent changes in antitrust policy alike have a great impact on the discipline of economics.[32] Thus, an examination of the internationalization of antitrust policy requires some appreciation and evaluation of economics theories and doctrines.[33]

It was said in the previous chapter that the present view adopted of the internationalization of antitrust policy requires various disciplines to be in harmony with one another. Just as the disciplines of law and political science must bear in mind various economic interpretations, so too economists should be encouraged to remain aware of policy designs offered by political scientists. According to Hay, the appropriate design of policy is crucial to the successful operation of antitrust policy.[34] Several scholars have argued that economic factors have always played an important role on the international plane and that events in the final years of the twentieth century forced different interests to concentrate their attention on the inevitable tensions and continuing interactions between economics and politics.[35]

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[30] See further chapter 10.

[31] According to Whish, "competition is about the way in which markets work: economic analysis is vital if reasonable policy decisions are to be made and if the law is to be applied in a sensible way". At p 46, note 2 *Ante*.

[32] See D. Neven, R. Nuttall & P. Seabright *Merger in Daylight* (London: Centre for Economic Research, 1993), ch 2; J. Bishop & M. Kay *European Mergers and Merger Policy* (Oxford, 1993).

[33] This point is of a particular importance in the light of the argument that payments and concessions between states are quite inevitable in the internationalization of antitrust policy. This has been advocated, in particular, by economists who have examined the economic incentives behind the process of internationalization. See for example A. Guzman "Is international antitrust possible?" (1998) 73 *N.Y.U.L. Rev.* 1501, at p 1505.

[34] Hay, at p 12, note 15 *Ante*.

[35] See R. Gilpin *Political Economy of International Relations* (Princeton University Press, 1987), at p 3; M. Porter *Competitive Advantage of Nations* (Macmillan, 1990); K. Ohmae *Borderless World: Power and Strategy in the Interlinked Economy* (Harper Collins, 1990).

(D) Competition, economists and policy consideration

Normally, when public policy considerations are injected in the market place. analytical dilemmas appear.[36] It is difficult to decipher which of the public policies should be called antitrust policy when the majority of such policies are actually or symbolically capable of affecting the process of competition in the market. There is a query as to whether it should be industrial policy, trade policy, consumer protection policy, other types of social policy or only public policy, which should be expressly named antitrust policy.[37] As a result of globalization, the distinction between these policies has become a fine one. It appears that antitrust policy, therefore, potentially has very wide scope, encompassing all policies that effect the conditions of competition.[38] This point is central to the present examination of the law and politics of the internationalization of antitrust policy.

Leaving the dilemma of searching for the appropriate form of public policy to one side, the issue of public intervention in order to regulate economic behaviour is itself, *prima facie*, a source of difficulty. This is an issue to which the discussion returns later.[39] For present purposes however, it is interesting to observe in this regard the paradox of mainstream economics theorists where, on the one hand, they discourage public regulation of industrial policy but, on the other hand, they are less sceptical as far as public regulation of antitrust policy is concerned. Writing during the 1930s economic depression in the US, Simons, the first Chicago school scholar, held the view that:

> "There must be outright dismantling of our gigantic corporations and persistent prosecution of producers who organize, by whatever methods, for price maintenance or output limitations . . . Legislation must prohibit, and administration effectively prevent, the acquisition by any private firms, or group of firms, of substantial monopoly power, regardless of how reasonably

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[36] See G. Amato *Antitrust and the Bounds of Power* (Hart Publishing, 1997), at p 2.

[37] See chapter 3.

[38] D. Fidler "Competition law and international relations" (1992) 41 *Int'l Comp. L. Q.* 563, at p 564.

See, for example, how Articles 87-89 EC are included in the antitrust policy chapter of the Treaty of Rome which shows that provisions on state aid are regarded as relevant to EC antitrust law and policy. Also, see Article 96 EC which gives the European Commission the right to take measures to override national laws and regulations that distort conditions of competition.

[39] See pp 48-51 *Post*.

> that power may appear to be exercised. The Federal Trade Commission must become perhaps the most powerful of our government agencies."[40]

From a critical stance, and in the light of the above analysis, it seems that there is lack of consensus amongst economists on how competition should be viewed, and whether it can be seen to offer a reliable explanation of the behaviour of undertakings in the market. Economists also disagree over the nature and extent of competition that should be encouraged in the market. Despite this lack of consensus however, there seems to be a recognition that competition is needed to deliver the benefits available from the market. Hence, it is desirable to encourage competition and adopt law(s) to protect it.[41]

(E) The means and end debate

The final issue to be considered in this part is the evergreen debate about whether competition is an end in itself or a means for attaining some other objective. The answer to this question does not seem to be particularly easy. Nor has the debate been definitely settled in favour of one view. Nevertheless, the more acceptable view seems to be that competition is a means to achieve economic prosperity and ensure economic fairness in the market place.[42] Competition, therefore, is not an ultimate goal in itself,[43] but rather an instrument to enhance the welfare of people and ensure a proper functioning of markets. Protecting competition through law and policy would

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[40] H. Simons *A Positive Program for Laissez Faire: Some Proposals for a Liberal Economic Policy* (Chicago: Chicago University Press, 1934), at p 43. It may be added that Simons' call to the antitrust barricades is ironic, for it may be argued that depression may actually have been partly caused by antitrust law enforcement.

[41] C. Doern & S. Wilks *Comparative Competition Policy* (Oxford, 1996), at p 1.

[42] This seems to be the prevailing view according to many scholars. See C. Bellamy "Some reflections on competition law in the global market" (1999) 34 *New Eng. L. Rev.* 15, at p 16. Also, C. Ehlermann & L. Laudati (eds.) *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing, 1998), at pp 123-4.

[43] Note that there can be an argument that competition is an end in itself. For example, the case where the Jeffersonian or atomistic competition is simply pursued to the end of having many small, independent businesses. This was a motivation behind the Celler-Kaufer Act (1950) when US Congress amended the merger provisions of the Clayton Act (1912). It could be argued, however, that this can be reduced to an argument that competition is a means to achieve some other purpose, since in this case it is striving for perfect competition and thus maximizing consumer welfare. Equally though this idea of having a thriving small business culture seems to be an end in itself.

make little sense if it were not believed that competition would help to achieve such goals.[44]

II. SOME HISTORICAL PERSPECTIVES OF A PARTICULAR IDEA AND POLITICAL PHILOSOPHY

The historical perspective of antitrust law sheds light on how it has developed and informs how it will continue to evolve.

The general antithesis towards monopoly and restrictive business practices is a very old one.[45] As early as 1602, in the case of *Darcy*,[46] the common law of England consolidated its stance towards monopoly. In that case, the King's Bench Division held that monopoly leads to poor quality, harms consumers and restricts competition.[47] In the centuries that followed, this common law view had a far-reaching effect. For example, the view was mentioned in the debates leading to the enactment of the Sherman Act (1890) in the US, during which Congressman J. Sherman argued that Congress was setting forth "the rule of common law, which prevails in England and in this country".[48]

The historical perspective of the antitrust law in other jurisdictions also has its own political idea and philosophy.[49] In the EC, for example, it is widely recognized that antitrust policy arose as a result of political and economic necessity.[50] Judge Bellamy, a former Member of the European Court of First Instance, has argued that the purpose behind including antitrust rules in the Treaty of Rome was to support the political idea

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[44] See pp 26-7 *Ante*.

[45] See *Dyer's* Case (1414) *YB* 11 Hen 5 of 5 pl 26.

[46] *Darcy v. Allein* (Case of Monopolies), 77 *Eng. Rep*. 1260. (K. B. 1602).

[47] *Ibid*., at pp 1262-3.

[48] 20 CONG. REC. 1167 (1889). This statement led some scholars to believe that the Sherman Act has a transatlantic origin, if not quite a global one. See for example Bellamy, note 42 *Ante*. But also see R. Posner *Antitrust Law: An Economic Perspective* (University of Chicago Press, 1976), at pp 22-3.

[49] Bellamy, at pp 15-7, note 42 *Ante*.

[50] See Goyder, ch 3, note 3 *Ante*. Also, A. Neale & D. Goyder *The Antitrust Laws of the United States of America: A study of Competition Enforced By Law* (Cambridge University Press, 1980), at p 439; Amato, at p 2, note 36 *Ante*.

behind the Treaty, namely to establish not only a single market but also ultimately "an ever closer union among the peoples of Europe".[51]

In the light of this fact, it seems that EC antitrust law, like English common law and US antitrust law,[52] all originated from a particular political idea or a political philosophy. This indicates a fundamental point about antitrust law: that it is extremely difficult to separate antitrust law from the political and historical framework in which it is set up.

III. CONCLUSION

There are three main conclusions. First, awareness of fundamental economic theories is essential to evaluate various antitrust policy debates. In particular, awareness of international economic issues is important to understand the internationalization of antitrust policy. However, economic theories do not seem to be consistent concerning how competition should be conceptualized, whether it merits protection, and if so how it should be protected. Secondly, it would be beneficial if economists are encouraged to consider policy designs offered by other disciplines, especially those offered by political scientists. It is believed that this would enhance consistency with regard to defining competition and its role in the global economy. Thirdly, the above brief historical perspective begs the question of whether constructing a "global framework" within antitrust policy is possible when the antitrust laws of nations do not share the same, or similar, historical origins and goals. This, in turn, relates to the overarching point and goals of antitrust law, which is considered in the following chapter.

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[51] Bellamy, at p 16, note 42 *Ante*.

[52] One must bear in mind that it was to break up the Standard Oil and U.S. Steel monopolies that the various US antitrust laws were passed. For a good account of the political perspective of the Sherman Act and other US antitrust laws, see E. Kintner *An Antitrust Primer* (Macmillan, 1973), at pp 16-26.

Chapter Three

ANTITRUST LAW: GOALS AND POLITICAL PERSPECTIVE

This chapter examines two important issues. The first issue, examined in part I, is the point and goals of antitrust law, which has always been a subject of heated debate, whether at national, regional or international level.[1] The second issue, examined in part II, is the political perspective of antitrust law, which is a difficult issue as it requires antitrust lawyers to step outside their own discipline. The conclusion of the chapter is contained in part III.

I. ANTITRUST LAW: CONCEPT, GOALS AND RELATED MATTERS

This part begins with considering antitrust law as a concept, then examines its objective and purpose and finally prepares the stage for a nexus to be established with the discussion on the political perspective of antitrust law.

(A) The concept of antitrust law

Antitrust law, the "law" used as an expression of the idea of competition, is generally negative and prohibitory in both nature and wording.[2] This is obvious since antitrust law does not directly encourage competition, but rather seeks – through the employment of legal systems – to prevent any form of anti-competitive behaviour in the market.[3]

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[1] See remarks by F. Jenny in C. Ehlermann & L. Laudati (eds.) *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing, 1998), at p 3.

[2] See H. First "Antitrust law" in A. Morrison (ed.), *Fundamentals of American Law* (Oxford, 1996); R. Bork *The Antitrust Paradox* (Basic books, 1978), at p 70.

[3] This definition corresponds to other definitions employed by different writers. Fidler, for example, uses the term "antitrust law" to refer to "those laws and rules directed at the competitive behaviour of economic entities". D. Fidler "Competition law and international relations" (1992) 41 *Int'l Comp. L. Q.* 563, at p 564.

The fact that law is used to protect competition has raised some difficult questions, especially since over the years, the idea of competition has adapted to evolving intellectual influences as well as legal and political changes. Nations differ with regard to whether antitrust law should be concerned with regulating uses of power by large undertakings than with the removal of hindrances to free competition; whether it protects competitors or the process of competition; and whether it is more concerned with the interests of consumers than the interests of producers. Differences between nations also exist with regard to the type of procedures and enforcement mechanism that should be relied on, to enforce antitrust law.

Quite interestingly, the point of using antitrust law to protect competition has been questioned. Khemani has argued that enacting antitrust law does not guarantee competition will ensue, that competition can exist without having antitrust law. This argument is supported with reference to the high degree of competitiveness enjoyed by states such as Japan, Singapore and Taiwan in the international arena.[4] Khemani has put forward two reasons why such nations consider and adopt some form of antitrust law: first, because they are forced, due to market globalization, to address the issue of competitiveness. Secondly, such nations turn to antitrust law in order to ensure that powerful domestic undertakings do not replace former state monopolies.[5]

In spite of this view, it was said in the previous chapter that competition needs law as a form of expression. In particular, there is a need to protect competition by antitrust law, in order to guarantee the benefits of the market.

(B) The goals of antitrust law

Writing in 1978, Bork emphasized that determining what the goals of antitrust law are is a precondition to rationalizing antitrust policy and building a body of coherent rules.[6]

The search for the goals of antitrust law is not particularly easy.[7] Two reasons can be offered in support of this view. First, the nature of antitrust law continues to be quite

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[4] See chapter 10.

[5] Ehlermann & Laudati, at pp 150-1, note 1 *Ante*.

[6] Bork, at p 50, note 2 *Ante*.

fluid, and its identity in general remains to some extent veiled.[8] This is evident from the academic literature in recent years. Gerber, for example, has referred to the situation in Europe to show that there is little awareness, including on the part of antitrust law specialists, of how European systems of antitrust law have developed, why they were created and the extent to which the systems have achieved their intended goals.[9]

Secondly, there is no consensus on the issue of goals. Several goals have been claimed in the name of antitrust law. It seems that the possibilities range from economic to social to political goals. In the US, the idea that the purpose of antitrust law is to enhance economic efficiency and maximize consumer welfare has been dominant. Some would argue that the aim of antitrust law is to protect small or medium undertakings.[10] Or perhaps its purpose is to prevent the emergence of private monopolies, which is capable of harming producers and consumers and ultimately threatening democratic society itself. In Eastern Europe and South America, antitrust law is seen as a means of facilitating the move from monopolization to demonopolization and from state control and planning to liberalization and privatization.[11] In the EC, antitrust law has one important objective, namely furthering market integration.[12]

The lack of clear consensus on goals may not generally matter very much to the extent that it is thought that competition is "good" and anti-competitive restraints are "bad".[13] However, not all nations believe that competition is good, let alone the fact that even in some of those nations where a system of antitrust has been introduced, competition and antitrust law and policy do not seem to be taken seriously. More importantly, having consensus in respect of the goals of antitrust law does matter

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[7] This is an evergreen "old" debate, which seems to stretch from the birth of the concept of antitrust law to the present time.

[8] R. Bork *The Tempting of America* (Sinclair-Stevenson, 1990), at pp 331-3.

[9] D. Gerber *Law and Competition in Twentieth Century Europe* (Oxford, 1998), at p 2.

[10] C. Bellamy "Some reflections on competition law in the global market" (1999) 34 *New Eng. L. Rev.* 15, at p 17.

[11] See chapter 10.

[12] See chapter 6.

[13] C. Doern & S. Wilks *Comparative Competition Policy* (Oxford, 1996), at p 1.

when one is faced with the internationalization of antitrust policy.[14] Given this view, any attempt to create a "global standard" within antitrust law and policy could be doomed to failure unless there is such consensus.[15] For this reason, it is essential to initially consider the issue of goals of antitrust law.

1. Antitrust law: legislative intent and the dynamics of the law

Before studying the different goals of antitrust law it is important to make a few general comments on the legislative intent behind its enactment. It is submitted that the search for the goals of antitrust law should not be confined strictly to the search of legislative intent behind its formulation. One ought to realize too that the law has, or is, capable of having wider, as well as other, overriding goals. For this reason, a heavy emphasis amongst lawyers on the legislative intent of antitrust law could lead to a great narrowness of viewpoint.[16]

The issue of legislative intent is pertinent for discovering the motivation behind the enactment of a particular antitrust law by a group of legislators at a particular time. It is crucial to remember this because antitrust law does not stand in isolation but rather stands within a wider framework (identified in the introduction to the thesis as "system").[17] This means that antitrust law belongs to an order, where different disciplines, factors and interests are interwoven together, which all evolve constantly, and all according to changes related to the relevant time period.[18] Even within the same jurisdiction, changes may occur over time. These include changes in the mix of

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[14] Note, however, that antitrust scholars are divided on this point. Those who are more in favour of internationalization tend to believe that consensus on the issue of goals does not present a problem, while those more sceptical about internationalization tend to believe that lack of consensus on the issue is a real problem. See E. Fox "Competition policy objectives in the context of multilateral competition code" in Ehlermann & Laudati, at p 135, note 1 *Ante*.

Nevertheless, it should not be thought that it is not possible to favour internationalization whilst at the same time regard the issue of goals as one demanding careful attention.

[15] See WTO *Annual Report* (1997), ch 4.

[16] J. Flynn "The Reagan administration's antitrust policy, 'original intent' and the legislative history of the Sherman Act" (1988) 83 *Antitrust Bull.* 259, at p 263.

[17] See chapter 1, note 31 and accompanying text. Note the existence of Article 3(g) EC. The Article provides that the EC shall have as its task the establishment of a "**system** ensuring that competition in the Common Market is not distorted". (Emphasis added)

[18] Report of the American Bar Association Sections of Antitrust Law and International Law and Practice on *The Internationalization of Competition Law Rules: Coordination and Convergence* (December, 1999), at note 23.

goals of antitrust law, the extent to which public intervention is acceptable and generally assumptions about the market place. One must not lose sight of the fact that market conditions are not static, rather may be influenced by various currents and so understanding antitrust law changes accordingly.[19] Thus, placing a particular emphasis on legislative intent would lead to overlooking the importance of the issue of goals.

2. Identifying the goals of antitrust law

The first thing to be said is that within a particular antitrust law, different provisions may aim to achieve different goals which may all fall along a spectrum of different policies.[20] Hence, it is advisable to analyze the various provisions of a particular antitrust law in terms of the policies underlying them.

Many goals have been advocated under antitrust law, but no exhaustive list may be drawn up, nor is any particular goal on the list conclusive. Several categories of goals – as referred to in statements of political institutions, antitrust authorities, court decisions and the work of academics and practitioners – may be identified. For the sake of convenience, it is proposed that those goals be classified into three broad categories: economic, social and political.

(i) Economic goals

The first category includes goals that concern issues of economic efficiency, the promotion of trade, facilitating economic liberalization (including privatization) and enhancing the development of a market economy.[21] The previous chapter mentioned this economic dimension, and concluded that the claims made by various schools of thought in economics are not decisive on the issue of goals.

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[19] R. Whish *Competition Law* (Butterworths, 2001), at p 16.

[20] See WTO *Annual Report* (1997), at p 39. Also, see Bellamy, at p 18, note 10 *Ante*, where the author speaks of antitrust law being placed in "a broader the social compact".

[21] The literature here is abundant. See E. Fox & E. Sullivan "Antitrust-retrospective and prospective: where are we coming from? Where are we going?" (1987) 62 *N.Y.U.L. Rev.* 936; K. Elzinga "The goals of antitrust: other than competition and efficiency, what else counts"; E. Sullivan "Economics and more humanistic disciplines: what are the sources of wisdom for antitrust?" (1977) 125 *U. Penn. L. R.* 1191 and 1214 respectively; J. Brodley "The economic goals of antitrust: efficiency, consumer welfare, and technological progress" (1987) 62 *N.Y.U.L. Rev.* 1020. These articles, with no exception, attempt to show that economic efficiency should not be considered as the only goal of antitrust law.

(ii) Social goals

The second category deals with consumer protection other than in the above-mentioned technical sense of economic efficiency. This covers the idea of safeguarding the consumer from undue exercise of market power and the dispersion of socio-economic power of large undertakings, safeguarding the opportunities and interest of small and medium-size undertakings, the protection of democratic values and principles, the protection of "public interest" and ensuring market fairness and equity.[22]

Underlying this antipathy towards the risks of private power are the principles of justice and economic equity in a market democracy. Former US President, Franklin Roosevelt, for example, once warned that the liberty of democracy can be threatened if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself.[23]

(iii) Broader political goals

The third category relates to wider overriding political aims, such as those relating to the process of integration in communities based on economic unions and free trade areas. The justification for including this third category is grounded on the recognition of these goals in some jurisdictions;[24] and by the fact that antitrust law is related to experience.[25] Therefore, when examining antitrust law, one ought not to generalize

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[22] G. Amato *Antitrust and the Bounds of Power* (Hart Publishing, 1997), at pp 2-3. A more practical explanation of this point can be found in Whish, at p 13, note 19 *Ante*.

[23] Franklin D. Roosevelt Library, New York, File 277. Some writers in the US, especially those who were not convinced by Bork's arguments, saw wealth distribution as being the primary value and goal underlying the legislative history of the Sherman Act. See R. Lande "Wealth transfers as the original and primary concern of antitrust: the efficiency interpretations challenged" (1982) 34 *Hastings L. J.* 65, at p 65.

It has been argued, however, that principles of fairness and equity normally advantage inefficient undertakings and disadvantage the most efficient ones. See F. Easterbrook "The limits of antitrust" (1984) 63 *Texas L. Rev.* 1; "Report from official Washington" (1982) 51 *Antitrust L. J.* 3. Furthermore, there seems to be some indication that these principles have ceased to be taken into account under US antitrust law. See *NYNEX Corp. v. Discon, Inc.* 119 S. Ct. 493 (1998).

[24] See M. Dabbah "International competition policy" in I. Akopova, M. Bothe, M. Dabbah, L. Entin & S. Vodolgin (eds.) *The Russian Federation and European Law*. (Forthcoming, 2001)

[25] See M. Lerner (ed.) *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinion* (New York: Random House, 1943), at pp 51-4. In the case of the EC for example, antitrust law is recognized as an important tool in achieving the goal of market integration. See chapter 6.

about the classification of goals. The manner in which antitrust law is interpreted and applied in different jurisdictions demonstrates that there are many situations in which it can be used, other than the above-mentioned categories of economic and social goals.[26] These situations can relate to specific sectors in national economy,[27] or even interstate sectors such as the EC.[28]

3. Some comments on the classification of goals

These categories, including the various aims therein, are rather competing with each other.[29] It has been said that it is hard to expect such diverse "types of interests" to be consistent with one another.[30] As a result, two concerns arise. The first relates to the extent that diversity on the issue of goals may affect the internationalization of antitrust policy. The second concerns ascertaining which of these goals should be pursued in order to construct a global order within antitrust law and policy.[31]

Recent views within the WTO seem to indicate that these concerns should not be particularly problematic because there may be convergence in the goals of antitrust law towards certain "core" principles. It is argued that convergence is to be expected, as nations increasingly look to one another for lessons and, as an increasing number of nations seek to become partners in the global trading system. Such an approach is in use already, albeit in a limited form, in certain jurisdictions and international organizations.[32]

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[26] For a good comparative study see "Competition policy in the OECD countries" (OECD, Paris, 1986).

[27] For example to deal with particular national issues such as economic developments, financial probity and unemployment.

[28] See C. Ehlermann "The contribution of the EC competition policy to the Single Market" (1992) 29 *CMLRev.* 257.

[29] See E. Petersmann "Legal, economic and political objectives of national and international competition policies: constitutional functions of WTO 'linking principles for trade and competition'" (1999) 34 *New Eng. L. Rev.* 145, at p 155.

[30] The WTO *Annual Report* (1997), at p 39.

[31] See chapters 9 & 10.

[32] See for example the work of the OECD Committee on Competition Law and Policy "Interim report on convergence of competition policies" (Paris, 1994c); US Federal Trade Commission "Anticipating the 21st century: competition policy in the new high-tech global marketplace" (1996). Several nations have adopted "core" objective approach, including Canada (Canadian Competition Act (1986)) (More information can be found on the Canada Competition Bureau's web site <http://www.strategis.ic.gc.ca/competition>) and Norway (See the Konkurranstilsynet's web site,

The difficulty associated with convergence approach however, is that it may not be possible to succeed in making these goals coincide.[33] For example how can one arrive at the "core" of antitrust law's purpose by convergence of goals covering economic efficiency (economics) and others dealing with generic concepts such as fairness and justice (law)? The fear is that certain goals, let alone their adoption by strong states, will prevail over other goals. Of course, those "other goals" may be advocated by weaker states.[34] For example, in developed states, the primary goal of antitrust law policy is to enhance an efficient allocation of resources and maximize consumer welfare in the traditional economic sense. In contrast, developing states tend to have a broader goal for antitrust law, namely building a market economy and securing the political acceptance necessary for this.[35]

Even if convergence is both possible and effective and an agreement on the goals of antitrust law amongst different systems of antitrust may be reached, there can still be great disparity between states regarding the means of convergence and regarding how the means to achieve these goals is perceived.[36] This can be illustrated by the way in which different states consider antitrust policy should be enforced.

Assume that state A, state B and state C share identical goals for antitrust law. A fundamental cause of divergence in antitrust policy between them would be that the means of achieving those goals may be differently conceived by each state. This

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<http://www.konkurransetilsynet.no>). This issue is covered in the United Nations Conference on Trade and Development (UNCTAD) "Draft commentaries to possible elements for articles of a model Law of laws" (Geneva: August, 1995). See also ABA, at p 16, note 18 *Ante*. Chapter 6 contains some useful discussion of this issue in relation to the EC.

[33] It has been argued that convergence is not possible when different goals are claimed in the name of antitrust law and when antitrust policy is dynamic and constantly evolving. See M. Azcuenaga "The evolution of international competition policy: a FTC perspective" (1992) *Fordham Corp. L. Inst.* 1, at p 13.

[34] See A. Guzman "Is international antitrust possible?" (1998) 73 *N.Y.U.L. Rev.* 1501, at p 1505, at 1501. The author argues that the prospects for substantive international antitrust policy are slim. International agreements in respect to antitrust policy, he concludes, would benefit some nations (potential winners) at the expense of others (potential losers).

[35] Ehlermann & Laudati, at p 35, note 1 *Ante*. It may be of interest to consider the views normally expressed by the US which show the existence of a controversy with regard to the respective positions of strong and weak states. According to officials in the US, the internationalization of antitrust policy, in general, and the convergence of goals in particular, will lead to a lowest common denominator, whereby states with strong systems of antitrust will be forced to accept weaker goals advocated by other states with weaker systems of antitrust. See remarks by J. Klein, *Ibid.*, at pp 247-60. See further chapter 10.

[36] See pp 16-7 *Ante*.

divergence of perception may be attributed to lack of agreement between the states over the optimal means of achieving identical goals which is generally caused by differences in the circumstances prevalent in each state. For example, culture may affect the optimal means of achieving a particular goal and thus, the choice of antitrust law and policy.[37] This is reflected by the fact that antitrust law tradition may differ from one nation to the next. A central feature of the EC antitrust law tradition has been the idea that antitrust law is special and that using law to protect competition moves outside the discipline of law. In light of this view, EC antitrust law is a new type of law which deals with problems for which traditional legal mechanisms are not suitable, and thus it requires correspondingly non-traditional methods and procedures. This contrasts sharply with the approach of US antitrust law, which relies primarily on traditional legal forms and institutions in protecting competition.[38] The following quote by Whish brings the discussion full circle:

> "There is no single coherent policy which binds EC or UK law together: there is no simple premise from which decisions flow through the application of logic alone. In particular competition policy does not exist in a vacuum: it is an expression of the current values and aims of society and is as susceptible to change as political thinking generally. Because views and insights change over a period of time, competition law is infused with tension. Furthermore different systems of competition law reflect different concerns, an important point when comparing the laws of the US, the EC and the UK. As already noted, competition law has now been adopted in at least 80 countries, whose economies and economic development may be very different. It is impossible to suppose that each system will have identical concerns."[39]

Other differences, such as the size of the state, may also affect the choice of antitrust law and policy.[40] Hence such structural differences as well as differences in substantive law, between states may lead them to diverge with respect to the goals of antitrust law.[41]

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[37] See L. Haucher & M. Moran *Capitalism, Culture and Economic Regulation* (Oxford, 1989), at p 3.

[38] Gerber, at p 12, note 9 *Ante*.

[39] Whish, at p 12, note 19 *Ante*. See also WTO *Annual Report* (1997), at p 34.

[40] For example a relatively small economy may choose to offer an efficiency defence to mergers with anti-competitive effect (Section 96 of the Canadian Competition Act (1986)), whereas a larger economy may not opt for such a defence (the US).

[41] See further chapter 10.

II. A POLITICAL PERSPECTIVE OF ANTITRUST LAW

(A) The heart of the matter

A fundamental point about antitrust law, which is common to most if not all jurisdictions, is how it is seen as a response to an important problem of democracy.[42] Amato explains that this point concerns how private power may be employed to infringe not only the freedom of other individuals, but also the balance of public decisions "exposed to its domineering strength".[43]

According to Amato, on the basis of the principles of liberal democracy, this problem is two-fold and constitutes a real dilemma:

> "Citizens have the right to have their freedoms acknowledged and to exercise them; but just because they are freedoms they must never become coercion, an imposition on others. Power in liberal democratic societies is, in the public sphere, recognized only in those who hold it legitimately on the basis of law, while in the private sphere, it does not go beyond the limited prerogatives allotted within the firm to its owner. Beyond these limits, private power in a liberal democracy . . . is in principle seen to be abusive, and must be limited so that no one can take decisions that produce effects on others without their assent being given.
>
> On the basis of the same principles, the power of government exists specifically to guarantee against the emergence of phenomena of that sort . . . But this, which is its task, is also its limitation: abuses forbidden for individuals are not allowed for rulers either. Here is then the dilemma.
>
> In a democratic society, then there are two bounds that should never be crossed: one beyond which the unlegitimated power of individuals arises, the other beyond which legitimate public power becomes illegitimate. Where do these bounds lie? This is the real nub of the dilemma."[44]

Applying this analysis, it seems that there is an apparent inconsistency between two perspectives on the role of competition and antitrust law.[45] The idea of competition is rooted in the freedom of economic undertakings.[46] However, antitrust law can limit this freedom. At first sight, this limitation seems to be inconsistent with the idea of competition, its dynamic and democratic values. This apparent inconsistency results in a balance being struck between two sets of considerations and interests associated

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[42] See generally E. Kintner *An Antitrust Primer* (Macmillan, 1973).

[43] Amato, at p 2, note 22 *Ante*.

[44] *Ibid.*, at p 3. Reference is made to the principle of liberal democracy because this dilemma really has its roots entrenched there. See J. Locke *Two Treatises of Government* (Cambridge University Press, 1988), at p 118.

[45] ABA, at p 20, note 18 *Ante*.

with them. One is concerned with the interests of those whose freedom is limited by the law, which is a short-term consideration. This consideration is normally prevalent in jurisdictions where public authorities are hostile to dominant undertakings and assume that such undertakings have, and will use their, economic dominance to harm small competitors. The other relates to the interests of those whose freedom is, or may be, limited by the actions of others, in the case of anti-competitive practices of undertakings. This is a long-term consideration because it takes into account the consequences for those whose freedom would be limited over time, should the law fail to address the limitation on their freedom or the source of harm to their interests.[47] Put another way, the balance is essentially between the bounds of public power and private power and the relationship between these two forces. As a corollary of this balance, the question arises of whether the market can be relied on to address competition concerns and to provide for itself in the long term, or whether there is a need for public intervention to address such concerns in the short term.[48]

(B) Who makes decisions?

This apparent inconsistency reveals an interesting aspect of antitrust law, that the law is about who should hold power over making various types of decisions that affect the market and its functioning. This aspect has already been identified in the literature. Whish, for example, argued several years ago that antitrust law is a matter of who makes important commercial decisions.[49] One view might be that each undertaking should be left to decide its own policy in the hope that self-interest and the public interest will somehow coincide. On the other hand it might be thought that public autthorities should take a more interventionist approach. The author supports his view with reference to the EC, where the way in which the European Commission has applied Article 81(1) EC – by historically opting for a wide view of practices falling

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[46] See pp 26-7 *Ante*.

[47] Gerber, at p 9, note 9 *Ante*.

[48] It has been argued that there are two opposing perspectives of antitrust law. "The first is antitrust law that delays intervention to the last, leaving the market to provide as far as possible by itself for a definition of its own dynamics and its own equilibria: only imminent risk, with no alternatives, of output restriction justifies and permits intervention. The second is antitrust law that seeks to prevent that risk emerging and inserts itself more frequently and earlier into ongoing market dynamics, seeking to influence their structure." See Amato, at p 112, note 22 *Ante*. See also chapter 7.

[49] Whish, at p 15, note 19 *Ante*. See also WTO *Annual Report* (1996).

within the Article and then exempting certain agreements under Article 81(3) – shows a fair degree of dirigism.[50]

The issue of decision-making – or more commonly, the making of important commercial decisions – is central to the present work. Its relevance resides in the query of whether the state or business undertakings should be the key player in the internationalization of antitrust policy.[51] In turn, this query leads to another on whether entrusting decision making to one side as opposed to the other affects the process of internationalization.

Normally, the internationalization of antitrust policy is debated from the perspective of the states, who are viewed as the sole and major players in the process, since they hold the final say. Recently however, some recognition has emerged that the internationalization needs to be considered at least from a shared perspective.[52] The other point of view in question is that of the business community. This is because the internationalization of antitrust policy is in part a response to the globalization of markets – which is a direct result of the operation of business undertakings in markets beyond national boundaries – and so the needs and the role of business undertakings should be considered within the process.[53] This is an issue which will be discussed in more detail in chapter 10.

(C) Public intervention

In regulating the conditions of competition in the market, the "invisible hand" of competition may, at times, be replaced with the more visible hand of public institutions.[54] Whilst it is understandable that this is inevitable in some cases, especially to address anti-competitive behaviour in the market, it seems that public intervention can generate some uncertain implications. These uncertain implications are a source of difficulty in the internationalization of antitrust policy. First, the afore-

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[50] *Ibid.*

[51] Gerber, at p15, note 9 *Ante*. See chapters 7 and 10.

[52] See E. Fox "Global problems in a world of national law" (1999) 34 *New Eng. L. Rev.* 11, at pp 11-3. Also, J. Griffin "What business people want from a world antitrust code" (1999) 34 *New Eng. L. Rev.* 39.

[53] See R. Weintraub "Globalization effect on antitrust law" (1999) 34 *New Eng. L. Rev.* 27.

mentioned opposing perspectives of antitrust law can exist in two different jurisdictions. For example, this is the case with the EC and the US. Secondly, the perspective within one jurisdiction may change over time. The Critical Legal Studies movement has attempted to explain this sentiment with reference to the way in which the application of US antitrust law has been handled:

> "Antitrust law was enacted for the people. Although vague in its terminology, one thing was clear; antitrust was meant to check exploitation, control power, and thus enhance the quality of life for the common person. But almost at their first opportunity, the judges turned the law against its beneficiaries. The first antitrust injunction affirmed by the Supreme Court was an injunction against the workers' strike led by Eugene Debs. Congress was constrained to respond, and adopted an explicit labour exemption.
>
> History shows that the antitrust laws have been a tool to legitimate power. Through the years some justices tried to deflect this trend, but the economic forces pushed the law to its logical end. "Exploitation", once a reason for the law, is now offered as a reason for not enforcing it. People in power to connote the process whereby participants in the market place seize every opportunity to make more money and thereby contribute to the alleged public good use exploitation as a positive word. If the law interferes with the freedom to exploit, it is labelled perverse law, and the judges, not wanting to be labelled perverse or blamed for holding back American business, find ways to construe the law to condone freedom of exploitation. Practices that were once illegal are now to be at most, "merely" unfair, not an area for antitrust enforcement.
>
> Ironies abound. The biggest steel companies in the nation merge, the biggest oil companies merge, the biggest airlines merge, all with the blessings of the Justice Department and the FTC. The two biggest car companies in the world form a joint venture with the consent of the FTC. The Justice Department withdraws the Government's monopoly case against IBM because it is afraid the Government will win. Cartels are blessed as long as they are export cartels and "only" hurt citizens of other nations, such as those of the third world. Thus the law against exploitation has become the law for exploiters. Efficiency and power win. Antitrust and the free market are one, save only for the occasional government action or pronouncement to "remind" the people that business is being regulated in the public interest."[55]

If one traces these uncertain implications to their origin, it becomes apparent that the reason different perspectives on antitrust policy exist, arises from the way antitrust law is applied by public institutions.[56] Therefore, there is an important issue in the relationship between the law, as it appears in statute, and the way it is applied by institutions in practice. This relationship has been examined by Gerber, who has

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[54] Whish, at p 15, note 19 *Ante*; E. Fox "The politics of law and economics in judicial decision making: antitrust as a window" (1986) 61 *N.Y.U.L. Rev.* 444, at p 554.

[55] Franklin Roosevelt Library, New York, File 277. See also Kintner, at pp 228-32, note 42 *Ante*.

One ought to realize however, that a change in administration in Washington D.C. can impact on such views with regard to the application and enforcement of US antitrust law.

[56] See remarks of a leading official in the Reagan administration on the Federal Trade Commission and its officials, that they are "hostile to the business system, to the free trade, and who sit down and invent

explained that in this relationship antitrust law, as it appears in the statute, defines and configures power relationships, and, in turn, public institutions manipulate the statute and its interpretation in order to achieve institutional, other political, and even personal goals.[57]

In light of the discussion thus far, this adequately shows that antitrust law may be, and actually is, subject to political influence. The politics of a system of antitrust is apparent from the manner in which antitrust authorities apply their domestic antitrust law, whether in the way the goals of antitrust law receive legal expressions in the statutes or in their guidelines and policy statements based on these statutes.[58] These expressions vary from one jurisdiction to the next, which, in turn, affects the internationalization of antitrust policy.[59]

There are several points that illustrate how politics is apparent in this instance which can also provide a subtle ground for scrutinizing the law and politics of the internationalization of antitrust policy. The first point, arising from the manner in which antitrust law cases are decided, is the potential causal distance between antitrust policy (however defined) and its outcomes. "The policy journey from statute to regulation to guideline, and form complaint to case to warning to enforcement to appeal to court ruling, is more akin to the Olympic policy marathon than the 100-metre policy implementation dash."[60]

The second point is the issue of independence of antitrust authorities. As different players and interests are involved in antitrust law and policy, there is a possibility that antitrust authorities become subject to political pressures. Khemani has argued that

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theories that justify more meddling and interference in the economy". D. Stockman, Director of Office Management and Budget, Chicago Tribune, at A-1, cols. 2-3 (February 23, 1981).

[57] See D. Gerber "The transformation of European Community competition law" (1994) 35 *Harv. Int'l L. J.* 97, at p 100. Also, see D. Tarullo "Norms and institutions in global competition policy" (2000) 94 *Am. J. Int'l L.* 478.

[58] Doern and Wilks argued that three modes of such political expression exist: the goals of the core antitrust policy areas; the extent and nature of non-antitrust policy goals that are allowed by statute to be considered in decision-making; and exemption provisions. See p 15, note 13 *Ante*.

[59] See chapter 4.

[60] Doern & Wilks, at p 14, note 13 *Ante*.

distancing antitrust authorities from these pressures is favourable from a legal standpoint[61] as much as from the point of view of the institutional structure:

> "Political independence of the administrative mechanism to deal with competition conflicts should be fostered. In order to address trade-related issues, the law should establish standing of private, foreigners and exporters, including those without subsidiaries. Non-discrimination principles, i.e. national treatment, should also be provided."[62]

The third issue relates to the question of whether antitrust law aims to protect competition or competitors, which directly arises from the issue of point and goals. Faull has opined that this question may lead the antitrust community down dangerous paths – as has happened in the EC – with the emergence of two different groups: one that believes the purpose of EC antitrust law, in particular Article 81 EC, is to protect the freedom of undertakings to sell goods and provide services, and another that believes that the aim of the law is to protect the process of competition.[63]

Other views however, have been less concerned about this question. Kobayashi has argued that:

> "It may be useful to compare competition policy with medical care. The direct objective of medical care is to cure the patient's illness, to remove impediments to health. Similarly, the direct objective of competition policy is to eliminate impediments to competition such as cartels, abuses of dominance, and so forth. There is a substantial parallelism between the two. The state of health of each individual is different from one person to another. The course of illness differs, the effect of injuries differs, and therefore the medical care given to each individual differs. However, the direct objective remains the same: to remove the impediment to health. Similarly, with regard to competition policy, the economic conditions of each nation differ, and impediments to competition differ. Therefore the measure taken under the

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[61] It is important to ensure that decisions regarding the investigation and prosecution of particular cases are consistent with consideration of "natural justice" or procedural fairness. There is no doubt that injecting more considerations of fairness and justice will reduce the influence of politics. This can have a positive impact on the issue of making of important commercial decisions in the market. Ensuring an adequate degree of independence can also help to ensure the administration of antitrust law does not itself become an instrument of rent seeking. See A. Krueger "The political economy of rent-seeking society" (1974) 64 *Am. Econ. Rev.* 291; J. Buchanan "Rent seeking and profit seeking" in J. Buchanan, R. Tollison & G. Tullock (eds.) *Toward a Theory of the Rent Seeking Society* (1980). See WTO *Annual Report* (1997).

[62] Ehlermann & Laudati, at p 140, note 1 *Ante*. See also R. Posner "The Federal Trade Commission" (1969) 46 *Chi.-Kent L. Rev.* 48, at p 54. Posner noted that the politicization of antitrust law at the US Federal Trade Commission was due to its dependence on Congress. Note also the proposal on the table in the EC to establish an independent non-political antitrust authority in order to separate between political regulatory powers and decisional ones. See C. Ehlermann "Reflections on a European Cartel Office" (1995) 32 *CMLRev.* 471; A. Pera & M. Todino "Enforcement of EC competition rules: a need for reform?" (1996) *Fordham Corp. L. Inst.* 125. See further chapters 10 and 11.

[63] Ehlemann & Laudatti, at p 12, note 1 *Ante*.

> competition law to remove those impediments must differ, although the objectives of competition policy are the same: to protect the process of competition."[64]

III. CONCLUSION

There are three main conclusions. First, a discussion on the point and goals of antitrust law is central to the internationalization of antitrust policy, which confirms the presumption made at the beginning of the chapter. Secondly, the discussion of goals opens up a scope for demonstrating that it is difficult to separate antitrust law from a political perception at any one time. The politics of antitrust law in general, and the internationalization of antitrust policy in particular, become visible in several ways. A common factor to these ways is the manner in which public institutions give legal expression to the goals of antitrust law, whether in statutes, or in the way they interpret, apply and enforce these instruments. The third conclusion is that it is imperative to consider the issue of public intervention in the market. This, in turn, raises questions of institutional approaches and arrangements, which are examined in the following chapter.

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[64] *Ibid.*, at p 21.

Chapter Four

THE USE OF DISCRETION

Antitrust authorities and public authorities more generally enjoy discretion in the way they may regulate conditions of competition in the market, and in the way they implement and enforce antitrust policy.[1] However, this use of discretion can be an issue of concern in antitrust policy, in general, and in the internationalization thereof, in particular. The concern in this instance mainly arises from the way in which similar antitrust laws in different jurisdictions may be radically different when enforced – a situation that often leads to a divergence in the legal standards amongst those jurisdictions.[2] This divergence in some cases may be facilitated by natural factors, such as culture, experience and other structural issues, which are special to those jurisdictions individually.[3] Although, in other cases the divergence can be the pure result of the use of discretion by antitrust authorities. Hence, it is important to inquire to what extent this use of discretion, in general, and the resulting divergence, in particular, affect the internationalization of antitrust policy.[4]

This chapter examines the use of discretion by antitrust authorities, an issue hardly explored in antitrust law literature, and its relation to the internationalization of antitrust policy. As part of the analytical exercise, the chapter considers questions of institutional approaches, political factors and policy designs. The chapter is structured

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[1] The use of discretion is quite common to most legal systems in the world. Davis has argued that various policies and their instruments should be viewed within a framework to be wielded by administrative institutions with high level of discretion. See K. Davis *Discretionary Justice* (Baton Rouge, La., 1969), at pp 216-7.

The fact that antitrust law is normally vague in terminology makes the use of discretion by antitrust authorities quite inevitable. See p 59 *Post*.

[2] A. Guzman "Is international antitrust possible" (1998) 73 *N.Y.U.L. Rev.* 1501, at p 1545.

[3] See L. Haucher & M. Moran *Capitalism, Culture and Economic Regulation* (Oxford, 1989), at p 3. Also, pp 44-5 *Ante*.

[4] According to some views, divergence between different jurisdictions is also problematic when it comes to comparing between these jurisdictions. See C. Doern & S. Wilks *Comparative Competition Policy* (Oxford, 1996), at p 20.

as follows. Part I attempts an explanation of what discretion really is and compares it with rule-making. Part II then identifies several cases in which the use of discretion can be an issue of concern. This is followed by part III which proposes some solutions to deal with cases where the use of discretion can be problematic. Part IV spells out the implications of the present analysis, before part V offers a conclusion.

I. A FRAMEWORK

(A) Explaining discretion

In the present context, discretion must be distinguished at the outset from competence, that is the legal power to act. When antitrust authorities make use of discretion, the effective limits on their exercise of power leave them free to make a choice from amongst possible courses of action or inaction. Some elements of this statement merit particular emphasis. First, discretion is not limited to what is authorized or what is legal but includes all that which is within the effective limits on the power of antitrust authorities. Much discretion may be seen as illegal or at least of questionable legality. Secondly, cases involving a choice to do nothing are definitely included. Perhaps inaction decisions are ten or twenty times as frequent as action decisions. Some examples of inaction decisions can be found in the way antitrust authorities select cases for investigation, open proceedings and formulate decisions in those cases. In the last example, discretion is exercised not merely in the adoption of final decisions, but also in interim steps; and interim choices are far more numerous than final ones.[5] Thirdly, discretion is not limited to substantive choices but extends to procedures, methods of action and many other non-substantive factors.

(B) Discretion *vis-à-vis* rule-making

To gain a better understanding of what discretion really is, it should be compared with rule-making approach. The latter does not only connote a proceeding to make rules, but also refers to the means for gathering the necessary facts from which it may be determined what kind of rules should be formulated. According to this approach, those who exercise authority must conform strictly to the rules. The expositors of the rules are the courts, which perform their duties within the rigorous confines of written norms. Along with administrative and bureaucratic institutions, they only have the

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[5] The truth behind this can be seen in the case of the EC. See, for example, the European Commission 21st Report on Competition Policy (1991).

power to interpret and apply, and not alter, those rules.[6] This view of institutions and their role is based on considerations of fairness and protection against abuse(s) of public power. It insists on enhancing the equal treatment of all by eliminating the effects of personal inclination in the decision-making process. By requiring conformity with stated rules,[7] it ensures that natural and legal persons will be able to plan their conduct in accordance with predictable outcomes.

II. IDENTIFYING INSTANCES OF DISCRETION

The purpose of this part of the chapter is to give an account, albeit brief, of instances in the practice of antitrust authorities which highlight the existence of use of discretion. Normally, this use of discretion is apparent in the following situations:

(A) Case selection and initiation of proceeding

Antitrust authorities generally enjoy wide discretion in their choice of cases for investigation. A good example is provided by the practice of the European Commission. The Commission has wide discretion in deciding whether or not to open proceedings. This has been confirmed not only by the Commission itself, but also by the EC Courts.[8]

(B) Adoption of binding decisions

Caution is necessary when discussing the use of discretion by antitrust authorities in the outcome of antitrust proceedings. This is because not all antitrust authorities in the world enjoy the necessary competence to formulate legal propositions – in the form of binding decisions on undertakings – when they apply their domestic antitrust laws. This can be illustrated with reference to the situation in the US and the EC. In the US, "the judges play a leading role. Litigation plays a leading role. Despite the influence of the Department of Justice and the Federal Trade Commission, it is largely judge-

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[6] F. Hayek, *The Road to Serfdom* (Chicago, 1944), at pp 72-3. Also, see report of the Franks Committee on Administrative Tribunals in the UK (Cmnd. No. 218, 1957), at p 6.

[7] As Duguit observed, "no organ of the state may render an individual decision which would not conform to a general rule previously stated". L. Duguit *Traité De Droit Constitutionnel* (Paris, 1927), at p 681.

[8] See Commission 14th Report on Competition Policy (1984), in which the Commission referred at p 119 to the judgment of the ECJ in Joined Cases 43 & 63/82 *Dutch/Flemish book* [1984] ECR 19. Also, see the Opinion of Advocate General Rozès in Case 210/81 *Demo-Studio Schmidt v. Commission* [1983] ECR 3045, at p 3070. The most important case on this issue however, is Case T-24/90 *Automec srl v. Commission* [1992] II-2223.

made law. In the [EC], the primary decisions are taken first by administrators, the senior officials of the Commission. And when it comes to judicial control at the level of the Court of First Instance, it is judicial review. . ."[9]

However, those antitrust authorities which are able to issue binding decisions on undertakings enjoy wide discretion. On this view, some antitrust authorities enjoy more discretion than others; in terms of their ability to formulate binding decisions in antitrust cases. This means that the use of discretion can vary from one antitrust authority to the next, a situation that can impact on the internationalization of antitrust policy.

(C) Informal and interim settlements

Not every investigation initiated by an antitrust authority results in a final binding decision. More often, an antitrust authority reaches more informal or interim settlements with business undertakings rather than final decisions. It is submitted that an antitrust authority normally enjoys wide discretion in reaching these settlements.[10] Despite the practicalities of these settlements, there seems to be some concern however, regarding the way these settlements are reached. Van Bael exemplified this concern with reference to the practice of the European Commission:

> "It is unquestionable that settlement procedures should be encouraged because they save time and money for both the Commission and the defendant, while at the same time the complainant or public at large enjoy faster relief from restrictive effects of violation. However, since the Commission, by entering into settlements, is in fact shaping its policy without any of the procedural safeguards provided by an administrative proceeding, it is

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[9] C. Bellamy "Some reflections on competition law in the global market" (1999) 34 *New Eng. L. Rev.* 15, at p 18.

[10] A good example is furnished by the settlements that the European Commission reached with *Fiat* and *Alfa Romeo* (See (1984) 17 EC Bull. No. 11, at p 24) and with *British Leyland* (OJ [1984] L-207/11). In the first case, a settlement between the Commission and the parties was reached when Fiat and Alfa agreed to instruct their dealers to refrain from promoting the purchase of right-hand-drive cars on the Continent which were sold at lower prices than those in the UK. In the second case, a binding decision and a fine was imposed by the Commission on *British Leyland*, even though the latter made similar commitments to those of *Fiat* and *Alfa Romeo*.

A similar claim can be made about the position adopted by the Commission in merger cases. Compare, for example, *British Airways/British Caledonian* (Noted in Commission 18th Report on Competition Policy (1988), at p 81) and *British Sugar/Berisford* (noted in Commission 12th Report on Competition Policy (1982), at p 104) with *Electrolux/Zanussi* and *Philips/Grundig*, which were completed without any intervention on the part of the Commission.

> imperative that the Commission's actions in this respect be sufficiently transparent so as to remain subject to public and judicial scrutiny."[11]

In light of this comment, it is submitted that the settlement practice of antitrust authorities should be monitored. Once a proceeding is commenced, antitrust authorities should not be at liberty to ignore any existing minimum procedural safeguards simply by embarking on a course toward settlement.[12]

(D) Exemptions

The issue of exemptions in antitrust policy is problematic. For example, where antitrust law cases involve two or more states, one state may tend to grant an exemption to harmful activities by its own undertakings on grounds of industrial policy or the state in question may believe that these activities do not raise any concerns for its domestic market. However, these activities may be harmful to the conditions of competition, and undertakings in the other state(s) concerned. For example, these activities may impede the access of foreign undertakings to the domestic market.[13] The fact that an exemption for the source of harm may be defended by the exempting state on the basis that no prescriptive law applies at all, can lead to conflicts between the states concerned.[14] Furthermore, an antitrust authority which enjoys the competence to grant exemptions to undertakings from antitrust law necessarily enjoys wide discretion.

(E) Differences in procedure

A comment on the fact that systems of antitrust in the world differ on procedure would provide an invaluable insight. There are several reasons why procedural differences have to be examined within the internationalization of antitrust policy. The fact that in some jurisdictions the competence to grant exemptions is not always

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[11] I. Van Bael "Insufficient judicial control of EC competition law enforcement" (1992) *Ford. Corp. L. Inst.* 733, at p 735.

[12] Some help can be found here by looking at the US Antitrust Procedures and Penalties Act (1974), which provides an adequate framework for ensuring transparency and judicial control of settlement practices of the US antitrust authorities.

Observing minimum procedural safeguards is expected to enhance the rights of undertakings, the propriety and credibility of antitrust authorities, as well as reduce the risks of uncertainty, inconsistency and unjust results.

[13] The issue of market access is examined in chapter 9.

[14] See E. Fox "Toward world antitrust and market access" (1997) 91 *Am. J. Int'l L.* 1, at p 1.

conferred upon antitrust authorities, but rather is the prerogative of the judiciary and the legislature – as is the case in the US –[15] means that divergence in the legal standards between different jurisdictions is inevitable. For example, in the EC system of antitrust an investigation is initially opened by the European Commission which may lead to a prohibition, and then a grant of an administrative exemption, a practice that has given rise to a great deal of criticism.[16] In some cases, the Commission's decisions may be reviewed by the Court of First Instance (CFI), and an appeal can even bring the case before the ECJ.

The EC jurisdiction is really an inquisitorial jurisdiction. It is not an adverserial jurisdiction. The ECJ in antitrust cases decides on the need to call witnesses, cross examines them and decides on the need to appoint an expert to make a report. This contrasts with the more adversarial US system, where the Department of Justice and the Federal Trade Commission bring an action before the courts. Deciding an antitrust case under the US system involves judges, a jury (in criminal cases), a sworn testimony, interrogations, discovery and cross-examination.

Finally, it ought to be acknowledged that procedures used in the relevant system of antitrust greatly influence substantive law developments. Therefore, it is important to examine the issue of procedure, in particular whether courts or administrative authorities should decide on antitrust law cases in an international system of antitrust.

III. DEALING WITH DISCRETION

(A) The possible ways

It should not be thought in the light of the discussion in the previous part that the use of discretion is undesirable. Nor should it be assumed that the use of discretion by antitrust authorities is untrammelled under all circumstances. As a matter of fact, that discussion shows that there are instances in which the discretion of antitrust authorities may be quite constrained. The use of discretion by antitrust authorities,

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[15] The Department of Justice and the Federal Trade Commission are not authorized under US antitrust laws to issue exemptions from the statutory prohibitions. However, this does not mean that exemptions are non-existent under US antitrust law. Congress has occasionally introduced exemptions, for example in relation to export cartels under the Webb-Pomerane Act (1918), railroad cartels, mergers deemed in the "public interest" and certain shipping cartels. For a good discussion of these exemptions see J. Griffin "United States antitrust laws and transnational transactions: an introduction" (1987) 21 *Int'l Law.* 307, at pp 314-7.

[16] See chapter 6.

like the use of discretion by administrative authorities in general, is not fixed but rather lies along a sliding scale, where in every instance something needs to be done.

Whether the use of discretion by antitrust authorities is wide or narrow depends on the way in which each nation's system of antitrust functions, on how antitrust policy and its role is conceived in the relevant system. As domestic antitrust authorities differ in their use of autonomy, the chapter proposes what should be done in all cases must normally take one of three forms: confining, structuring and checking.[17] By confining, it is meant to establish outer-boundaries and keeping discretion within them. The ideal, of course, is to put all necessary discretion within the boundaries, and to put all unnecessary discretion outside the boundaries, by drawing dividing, bright lines. Structuring includes encouraging antitrust authorities to develop plans, policy statements and rules, as well as open rules and open precedents. Finally, checking refers to judicial supervision and review. These three different alternatives are now examined in turn.

1. Confining discretion

Discussing constraints on discretion involves an attempt to answer questions such as whether the use of discretion by antitrust authorities should be uncontrolled. It is proposed here that this use of discretion should be confined.[18] The vague nature of antitrust law often means that discretion is delegated to antitrust authorities. The law often fixes certain limitations but leaves the ambit of discretion relatively open. By and large, it can be argued that the legislature usually does about as much as it reasonably can do in specifying the limits on delegated discretion. However, it may be deficient in providing further clarification. This is particularly the case where experience is needed to provide a foundation for this clarification. In such an instance, the legislature is almost deficient in correcting the assumption of discretion by antitrust authorities due to pressures on its time and the inability for it to draft for every contingency arising in relation to competition.

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[17] The terms were borrowed from Davis, note 1 *Ante*.

2. Structuring discretion

Since there is little scope for legislative intervention in order to confine the use of discretion, developing standards by antitrust authorities, and then, as circumstances permit, confine their own discretion through principles and rules is more promising.[19] This movement from vague standards to unambiguous standards, broad principles and rules can be accomplished by policy statements. It can also be accomplished by adjudicatory opinions or by the exercise of rule-making power.[20] A considerable part of the task of antitrust authorities should be devoted to facilitate compliance with the antitrust law by helping undertakings to understand it. Not only judicial policy, but also administrative policy must be developed by precedent and on publicly stated grounds. Only in this way can the law be clarified in a sensible way. Undertakings have the right to know what kind of behaviour would lead to prohibitions under the relevant antitrust law. Publishing policy statements by antitrust authorities and relying on a rule-making approach should help in developing a consistent antitrust policy.[21]

A more diligent use of antitrust authorities' rule-making power is a far more promising means of structuring the use of discretion than urging the legislature to enact more meaningful standards. This is not because clarification of law by antitrust authorities is preferable to clarification by the legislature; since the opposite is often true. The reason that the former clarification is more promising is that the legislature may not be expected to provide the needed clarification. Legislators know their own limitations, they know they are ill-equipped to plan detailed programmes for a policy that changes rapidly, all in relation to time and they recognize that antitrust authorities are better equipped because they can work continuously for long periods in specific areas.

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[18] Note the relevance of this issue in the context of centralization/decentralization in EC system of antitrust, where much of the recent 'modernization debate', namely making Article 81(3) EC directly applicable, has been about confining the use of discretion under this provision. See further chapter 6.

[19] A "rule" is a specified proposition of law, a "principle" is less specific and broader and a "standard" is still less specific and often rather vague. See generally R. Dworkin *Law's Empire* (Cambridge, Mass., 1986).

[20] See statements by T. Arnold, former US Attorney General, in the 1938 Department of Justice Annual Report.

[21] See M. Dabbah "Measuring the success of a system of competition law: a preliminary view" (2000) 21 *ECLR* 369, where it is argued that "competition advocacy" is one of the factors that ought to be used to measure the success of a system of antitrust.

Thus, the hope lies in the clarification of vague statutory standards.[22] The typical failure in a system of antitrust, which is correctable, is not legislative delegation of broad discretion with vague standards; but the procrastination of antitrust authorities in resorting to their rule-making power to replace vagueness with clarity. All concerned – business undertakings, legislators and the courts – should urge antitrust authorities to consider and adopt earlier and more diligent use of the rule-making power.

However, the typical tendency of antitrust authorities to refrain from resorting to the rule-making power may be understandable. Waiting for a case to arise, then clarifying only to the extent necessary to decide the case, and then waiting for the next case, is one way to construct antitrust principles.[23] In some circumstances, the slow process of making law only through adjudication is a necessity, for antitrust authorities may really be unable to decide more than one case at a time. Moreover, sometimes even when they can do more, they properly eschew early rule-making. Developing law through adjudication is a sound and necessary process; the majority of antitrust law in most jurisdictions is the product of this process.

Despite this fact, the argument can be advanced that antitrust authorities, by and large, have fallen into habits of unnecessarily delaying the use of their rule-making power. They often hold back even when their understanding suffices for useful clarification through rule-making – for reasons of resources or perhaps priorities in handling their investigations. When antitrust authorities do so, the likeliness for them to make use of discretion will be quite high. This is a point which requires significant thinking and academic comment.[24]

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[22] See further chapter 6.

[23] See Report of the American Bar Association Sections of Antitrust Law and International Law and Practice on *The Internationalization of Competition Law Rules: Coordination and Convergence* (December, 1999), at p 26.

[24] A more detailed examination of these issues somewhere else led me to this exact conclusion. See Dabbah, note 21 *Ante*.

Clearly, merger cases furnish a very good example of how antitrust authorities make use of discretion and delay the use of rule-making power for reasons of resources anf priorities in their work.

3. Checking discretion

The use of discretion by antitrust authorities needs a framework of judicial control, in order to separate between guided and unguided use of discretion. This discussion may be made more concrete by reference to the situation in the EC.

(i) The European Court of Justice (ECJ)

The ECJ enjoys wide powers under EC law, including the power to review decisions by the Commission.[25] However, the ECJ has not always been in favour of exercising this power, especially in cases where the Commission has utilized its discretion – including those cases involving wide discretion. This attitude of the ECJ can be identified in the light of several of its major judgments. In the early case of *Consten and Grundig*, the ECJ considered that "the exercise of the Commission's powers necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces therefrom. Their review must in the first place be carried out in respect of the reasons given for the decisions which must set out the facts and considerations on which the said evaluations are based".[26]

Twenty years later, the ECJ came to a similar conclusion, noting that the Commission based its decision on an assessment of complex economic situations. In the case of *Remia BV v. Commission*[27] the ECJ held that it must limit its review of such an assessment to verifying whether the relevant procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of assessment or abuse of powers.

It is obvious from these two judgments that the ECJ is reluctant to second-guess the decisions of the Commission, unless there is a clear abuse of power.[28] This attitude of the ECJ is controversial. The mere fact that the Commission has not committed any

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[25] See Article 230 EC.

[26] Joined Cases 56 & 58/64 *Establissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299, at p 347.

[27] See Case 42/84 *Remia BV v. Commission* [1985] ECR 2545.

[28] See M. Mendes *Antitrust in a World of Interrelated Economies: The Interplay Between Antitrust and Trade Policies in the US and the EEC* (Editions de lUniversite de Bruxelles, 1991), at p 82.

'manifest error' in adopting its decisions in antitrust cases should not necessarily mean that it has properly discharged its obligation of ensuring a proper application of EC antitrust rules. The discretion enjoyed by the Commission cannot and should not veil the requirement to produce informative decisions. It is advisable that the rule remains '*in dubio pro reo*' instead of '*in dubio pro Commissione*'.[29]

Some writers, however, seem less concerned about this attitude of the ECJ. It has been said that as the executive arm of the EC, it is sensible that the Commission is enabled to establish its own role as principal guardian of EC antitrust law, expand its geographical reach and conduct itself in any manner that enhances its international legal personality and recognition.[30]

The need for increased judicial monitoring is particularly important when set against the backdrop of the Commission's decision-making process.[31] Whilst in principle, decisions in antitrust cases are supposed to be reached by the full Commission – as a collegial body – in practice most of these decisions are reached through the so-called "written procedure", and not after a debate involving the entire Commission. Under this procedure, a draft decision is distributed amongst all directorates general in the Commission. A decision is considered to be adopted, unless objections are submitted within a time limit – normally less than a week. This actual state of affairs reiterates that the power to make decisions rests with those who handle the cases. The Commission acts as prosecutor, judge and possibly jury. On the basis of this situation, the ECJ's reluctance to perform more intervention in the practice of the Commission and its decisions means that the use of discretion by the Commission can go uncontrolled.[32]

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[29] See opinion of Advocate General Rozès in Case 210/81 *Demo-Studio Schmidt v. Commission* [1983] *ECR* 3045, at p 3070.

[30] See J. Friedberg "The convergence of law in an era of political integration: the *Wood Pulp* case of the *Alcoa* Effects doctrine" (1991) 52 *U. Pitt. L. Rev.* 289, at pp 322-3. See also the view expressed by Hawk in favour of this situation of a "highly centralized system" which he contrasted with "the Byzantine proliferation of statutes and enforcement authorities in the US, quoted in Mendes, at p 82, note 28 *Ante*.

[31] See for example *Re Continental Can Co.* Inc. [1972] CMLR D11.

[32] The position of the EC can be contrasted with that of Germany where the Kammergericht does not hesitate to review the discretionary findings of the Bundeskartellamt. This situation is remarkable since the Bundeskartellamt is a specialist body, whereas the Commission is a political institution. Of course, the discretionary findings of the Bundestkartellamt cannot be equated with those of the Commission, which is responsible for a wider variety of policies and concerns. For a general discussion on the

(ii) The Court of First Instance (CFI)

Establishing the CFI in 1989 marked the creation of a specialist court, and antitrust policy falls within the CFI's competence. The Commission's decisions can be subject to judicial review by the CFI, whose judgments, in turn, are subject to appeal to the ECJ.

Since its foundation, the CFI has produced several judgments, which make it difficult to discern the direction in which its jurisprudence has been moving. Nevertheless, it has produced some good judgments which show that the use of discretion by the Commission is being subjected to close scrutiny. In *Italian Flat Glass*, for example, the CFI held that the Commission should bear the burden of proof in antitrust cases and that this required standard is not satisfied by the Commission merely "recycling" the facts of the case.[33] A similar attitude by the CFI can be seen from its decision in *PVC*, where the CFI lamented the sloppy decision-making process of the Commission.[34]

In a more recent case, *European Night Services v. Commission*,[35] the CFI annulled the Commission decision, emphasizing the obligation on the Commission to set out the facts in individual cases and considerations having decisive importance in the context of its decisions. The CFI stated that while the Commission was not required to discuss the issues of law and facts and the considerations which have led it to adopt its decision, it is required under the EC Treaty to make it clear to the CFI and the undertakings concerned the circumstances in which it has applied EC antitrust rules. Thus, when a Commission decision applying EC antitrust law lacks important analytical data – which is vital to the application of EC antitrust provisions and to enable the CFI to establish whether an appreciable effect on competition exists – such as reference to market shares of the undertakings concerned, the Commission is not entitled to remedy such defect by adducing for the first time before the CFI such data.

German system of antitrust see Gerber D *Law and Competition in Twentieth Century Europe* (Oxford, 1998), at pp 276-306.

[33] Joined Cases T-68, 77 & 78/89 *Società Italiana Vetro v. Commission* [1992] 5 CMLR 302.

[34] Joined Cases T-79/89, T-84-86/89, T-91-92/89, T-94/89, T-96/89, T-98/89, T-102/89 & T-104/89 *BASF AG v. Commission* [1992] 4 CMLR 357.

[35] Cases T-374-5 & 388/94 [1998] CMLR 718.

Against these good judgments however, stands a line of cases in which the CFI has not been inclined to intervene with the use of wide discretion by the Commission, especially with regards to the imposition of fines and mitigating circumstances.[36]

IV. SOME IMPLICATIONS OF THE ANALYSIS

(A) A matter of choice

Adopting a particular institutional approach by antitrust authorities is essentially a matter of choice. The idea inherent in this kind of choice should be considered in light of the reasons for which the approach is adopted. Indeed, those reasons depend on the category of goals that are advocated in the relevant system of antitrust. Consequently, the category of goals impacts on the type of institutional approach. This means that divergence in the goals between different systems of antitrust can lead to differences in institutional approaches between those systems, which inexorably affects the internationalization of antitrust policy.[37]

(B) Political factors and policy considerations vs legal rules

It is also apparent from the above discussion that one of the main questions regarding the internationalization of antitrust policy concerns whether judges or administrators will decide antitrust cases in a global context.

This question corresponds to two different perspectives about the role of law courts and antitrust authorities, which have to be taken into account. On the one hand, if antitrust policy is regarded as being subject to political influence, the resulting internationalization thereof is likely to be seen as matter of debate on the use of discretion by administrative and bureaucratic institutions. If, on the other hand, political influence is ruled out, because, for example, one understands antitrust law as a means of protecting and maintaining a valued social good, the internationalization

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[36] See Case T-7/89 *S A Hercules Chemicals NV v. Commission* [1992] CMLR 84; Case T-69/89 *Radio Telefis Eireann v. Commission* [1991] 4 CMLR 586. This attitude by the CFI is quite surprising in the light of the purpose for which the CFI was established. Consider the following view of Advocate General Vesterdorf expressed in the same case, that "the very creation of the Court of First Instance as a court of both first and last instance for the examination of facts in cases brought before it is an invitation to undertake an intensive review in order to ascertain whether the evidence on which the Commission relies in adopting a contested decision is sound". *Ibid.*, at p 125.

[37] The implications here can be seen in the light of the fact that different states, including developed and developing states, do not agree on what the goals of antitrust law are or ought to be. See pp 38-45 *Ante*.

of antitrust policy is likely to be seen as a matter of debate on legal rights, judicial analysis, and judicial decision-making. In this instance, the influence of political factors and policy considerations would be decreased.[38]

(C) Further issues

The internationalization of antitrust policy has been advocated partly as a response to market globalization – a phenomenon that makes it clear that markets have become wider than states and that antitrust law matters frequently transcend national boundaries.[39] In this situation, domestic antitrust rules may not be suitable for regulating conditions of competition in those markets in general, and for addressing matters such as international jurisdiction, in particular. On this view, there seems to be a clear absence of adequate rules in this situation. Clearly, this is a situation in which the law ends.

In this situation, antitrust authorities have several options open to them.[40] In all options, the use of discretion will begin,[41] with the choice between either beneficence or tyranny,[42] either justice or injustice, either reasonableness or arbitrariness. Yet no member of these authorities would admit that where law ends beneficence, injustice, tyranny or arbitrariness begins. On the contrary, they would have everyone believe that where law ends, wise and just use of discretion begins.

Lastly, one has to appreciate the significance of two different issues. First, the use of discretion is related to the query of who should hold the locus of power in a system of antitrust. This is so, since the question is, how interventionist should public power be in the process of competition. Linked to this question is the understanding that a system of antitrust will usually function on the assumption that public power has the

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[38] See chapter 3, note 61 and accompanying text.

[39] See chapters 1 and 3.

[40] These options include extra-territorial application of domestic antitrust laws, reliance on co-operation agreements, which may exist between the antitrust authorities concerned etc. See further chapters 8 and 9.

[41] Antitrust authorities are largely concerned with applying the law, with making discretionary determinations, and with various mixtures of law, discretion and politics. As a matter of fact, they are much more occupied with discretion than with law.

[42] W. Pitt's words, "Where law ends tyranny begins" are engraved in stone on the Department of Justice Building in Washington D.C.

final say in any antitrust-related matter.[43] The second point is that the fact that the use of discretion varies among different systems of antitrust affects the internationalization of antitrust policy. These points are important because apart from anything else, they present an analytical challenge, which extends to issues of political bargaining and political acceptability possessed by the different players concerned.[44]

V. CONCLUSION

There are three primary conclusions. The first being, the basic one, that antitrust authorities make use of discretion, which in some cases may be wide discretion. Secondly, the use of discretion affects the internationalization of antitrust policy, especially since it often leads to divergence in the legal standards amongst different systems of antitrust. Lastly, something must be done to deal with the use of discretion, particularly in cases where the use of discretion is wide. This can take the form of confining, structuring or checking discretion.

It is recommended that confining discretion is a particularly good option to pursue, since it has the advantage of encouraging antitrust authorities to enhance the coherence of their decisional practice and to develop antitrust policy in a steady and sensible way. Not only would this lead to greater certainty in the practice of antitrust authorities, but also would make it more reliable for undertakings who often are in need of such certainty in their handling of market operations. The net result would be that the internationalization of antitrust policy – leading to the creation of an international system of antitrust – would be more achievable.

Confining discretion can also be supplemented with checking discretion. This is also desirable, since it would encourage antitrust authorities to keep within the confine of their discretion as well as afford undertakings the opportunity to bring actions – whether within or outside an international system of antitrust – against antitrust authorities in order to ensure that their interests and rights are adequately protected.

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[43] As the discussion in chapter 3 demonstrated, the question in particular, is whether the internationalization of antitrust policy should be arrived at with public initiative (states being the main actors and decision-makers) or private initiative (the market and business undertakings deciding for themselves). Arguably, the implications of having states as the primary actors in this matter are far-reaching and would carry with them a great impact on the entire process of internationalization of antitrust policy. One direct consequence would be that this process would be made subject to more political influence. See chapter 10.

[44] See further chapter 10 for a detailed account of the players concerned.

Chapter Five

A FRAMEWORK: THE DIFFERENT THEORIES

It was said in the first chapter that the internationalization of antitrust policy is a process through which an international system of antitrust can be established. According to the fourth, and arguably most central example of internationalization mentioned in that chapter, this system will include autonomous institutions. This chapter considers some theories which can facilitate a better understanding of the type of considerations that need to be taken into account regarding how this system can be established.

I. REALISM

From a Realist perspective, autonomous institutions in an international system of antitrust will be essentially ineffectual by imposing rules and standards upon sovereign states which do not conform to those states' own interests and priorities.[1] Hence, to pursue a form of internationalization leading to an international system of antitrust is pointless and absurd.

This view is explained on the basis of two Realist perspectives. At one end of the spectrum, it is unlikely that states will co-operate towards the creation of an international system of antitrust, especially if this would mean that states would have to limit their sovereignty in favour of the autonomous institutions in the system. At the other end of the spectrum and assuming that states would co-operate if they decide, for example, to limit the effect of rules and principles of an international system of antitrust, domestic courts and antitrust authorities would not apply that system's law due to reasons relating to sovereignty.[2]

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[1] For a detailed account on Realism see R. Wellek *The Concept of Realism in Literary Scholarship* (J.B. Wolters, 1961); M. Carré *Realists and Normalists* (Oxford, 1964).

[2] See chapter 7.

Realism asserts the primacy of national politics over international antitrust law (the law from above) and emphasizes the limits that sovereign states may impose upon their involvement in an international system of antitrust, which will stop well short of any surrender of sovereignty to autonomous institutions in such a system. Realism places no emphasis on the importance of autonomous institutions in this system. From here, it professes that such institutions have a very marginal role to play.

II. NEORATIONALISM

This approach to the internationalization of antitrust policy and the importance and effectiveness of autonomous institutions in an international system of antitrust,[3] proceeds from the basic Realist premise of the superiority of sovereign states. However, Neorationalists accept there is scope for co-operation among states and a role for such institutions based on rational choice made by sovereign states towards some form of co-operation on the creation of an international system of antitrust.

Neorationalists assert that autonomous institutions in an international system of antitrust will in fact be unable to impose their rules and standards on sovereign states and their domestic antitrust authorities or law courts, which may even be part of such a system. Any scope for co-operation between states towards the creation of an international system of antitrust and the ability of autonomous institutions to play any role in such a system do not result from an obligation of states to co-operate or from any autonomous power or discretion, enjoyed by these institutions. Sovereign states' co-operation towards the creation of an international system of antitrust with autonomous institutions, and their acceptance of rules and standards enunciated by such institutions, indicate that sovereign states would act rationally. Sovereign states in this case would opt for the gain that could result from co-operating, and from complying with those rules and standards, rather than the potential benefits from opting for no systematic antitrust policy on the international plane. Neorationalism argues that it is in the sovereign states' own interest to establish a system of antitrust and to transfer some competence to its institutions. This will have the benefit of relieving states, *inter alia*, from having to enter into bilateral agreements that anticipate any disputes that may arise among them.

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[3] See G. Garret "International cooperation and institutional choice: the European Community's internal market" (1992) 46 *Int'l Organization* 533.

III. NEOFUNCTIONALISM

Neofunctionalism is a political theory of how autonomous institutions can be formed and thereafter integrate their own domain in an international system.[4] This approach explains how individual interests and players may be involved, with specific identities, motives, and objectives in the creation of the system. Whilst this Neofunctionalist type of system construction has already been considered in certain areas,[5] it has never been applied to antitrust policy.

Neofunctionalism is generally concerned with explaining the methodology and reasons behind sovereign states' decisions and actions to cease to be wholly sovereign. It explains how and why states voluntarily mingle, merge or mix with each other so as to limit the factual attributes of sovereignty whilst acquiring new techniques for addressing different dimensions in their relationship, including any conflicts that may arise between them. In particular, it describes a process whereby political players in several distinct national settings are persuaded to shift their loyalties, expectations, and political activities towards a new centre, where institutions enjoy jurisdiction over the pre-existing absolutely-sovereign states.[6]

Neofunctionalism is employed in the present context to explain several features in the internationalization of antitrust policy. It can help us understand the process of internationalization, and in particular the relationship between antitrust and trade policy.[7] Trade policy has international orientations and links, whereas antitrust policy seems to be more inward-looking and derives its validity from national origins.[8] Neofunctionalism can help to explain how spillover(s) arise from trade to antitrust policy, which consequently can help advance antitrust policy towards the international plane. Three different types of spillover may be mentioned in this context: sectoral

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[4] The term was borrowed from E. Hass "The study of legal integration: reflection on the joy and anguish of pretheorising" (1970) 24 *Int'l Organization* 607.

[5] See E. Hass "Technocracy, pluralism and the new Europe" in S. Graubard (ed.) *A New Europe?* (Boston Houghton Mifflin, 1964).

[6] E. Hass "International integration: The European and the universal process" (1961) 15 *Int'l Organization* 366.

[7] See chapter 9.

[8] See E. Fox "Toward world antitrust and market access" (1997) *Am. J. Int'l L.* 1, at p 1.

spillover, political spillover and spillover enhancing common interests. These will be described in turn.

(A) Sectoral spillover

Sectoral spillover refers to the interdependence between the different sectors of a modern industrial economy. It is based on the assumption that an action taken in one sector makes achieving the original goal dependent on taking further actions in related sectors. As a result, further actions will be necessary. Sectoral spillover presupposes the existence of a common objective and simply dictates that the jurisdiction of the authorities charged with implementing that objective can expand as necessary to address whatever obstacles stand in the way.[9]

(B) Political spillover

This describes the process of an adaptive behaviour among nations. In this type of spillover, national expectations and values would shift towards the international plane, where national interest groups and political actors coalesce in response to sectoral spillover.[10]

(C) Spillover enhancing common interests

This occurs when sovereign states face significant hurdles in creating a common framework within a particular policy while acknowledging the necessity of reaching a consensus to safeguard other aspects of interdependence among them. One way of overcoming such deadlock is by exchanging concessions in related fields.[11]

Neofunctionalism will also help elucidate the role of different players in the internationalization of antitrust policy. The primary players in the construction of an international system of antitrust are not only sovereign states, but also forces above and below the state. Actors below the state include the individual and business interest groups and consumers etc. Above the state, there are existing regional and supranational orders, for example those within the framework of the EC, the North

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[9] See I. Claude *Swords Into Plow Shares* (New York, Random House, 1977); E. Hass & L. Lindberg *The Political Dynamics of the European Economic Integration* (Stanford University Press, 1963).

[10] E. Hass *Beyond the Nation-State* (Stanford University Press, 1964).

American Free Trade Agreement (NAFTA),[12] Australia-New Zealand Closer Economic Relations Trade Agreement (ANCESTRA), the Organization for Economic Co-operation and Development (OECD) and the WTO.[13] These organizations promote integration, foster the development of interest groups and cultivate ties with them.

What role is there for sovereign states within this setting of internationalization? According to Neofunctionalism, a sovereign state's role is "creatively responsive".[14] As holders of the ultimate political power through their decisional authority, sovereign states may accept, side-step, ignore, or even sabotage decisions from above or below, which have been made regarding market conditions.

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Realism and Neorationalism ultimately seem to lend only marginal support to the fourth example of internationalization through which an international system of antitrust can be established. At best, these theories focus on traditional forms of co-operation between sovereign states. Hence, they may be more suitable for pursuing examples one and two of internationalization, namely the ones on co-operation between domestic antitrust authorities and convergence of national antitrust laws.[15]

The theory of Neofunctionalism on the other hand seems to have a great deal to offer in terms of propositions and ideas, which could be plausible to various interests and players, if the fourth example of internationalization is to be pursued. The theory seems to be able to accommodate the variety of goals that are claimed in the name of antitrust law. It should also prove useful in examining the relationship between antitrust and trade policy, especially in relation to introducing market access principle under antitrust policy, an issue examined in chapter 9.

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[11] It has been argued that the existence of concessions and compensatory payments by developing countries to developed countries is necessary in order to reach a meaningful international antitrust policy. See A. Guzman "Is international antitrust possible" (1998) 73 *N.Y.U.L. Rev.* 1501, at p 1505.

[12] Canada-Mexico-United States, 32 I.L.M. 289 & 32 I.L.M. 605 (December 17, 1992).

[13] For a review of these frameworks see R. Harmsen & M. Leidy "Regional trading arrangements" in S. Khemani (ed.) *International Trade policies: The Uruguay Round and Beyond* (Background Papers vol. II, IMF, Washington D.C., 1994).

[14] R. Harrison *Europe in Question: Theories of Regional International Integration* (London: Allen & Unwin, 1974), @ p 80.

Lastly, much of the development of Neofunctionalism over the years arose in the context of the EC.[16] For this reason, looking at the case of the EC will, *inter alia*, facilitate better understanding of the application of the theory and furnish an example of the internationalization of antitrust policy. EC antitrust experience is examined in the following chapter.

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[15] See chapter 10.

[16] E. Hass *The Uniting of Europe* (Stanford University Press, 1958); Hass & Lindberg, note 9 *Ante*.

Chapter Six
EC ANTITRUST POLICY

This chapter examines the antitrust experience of the EC. Several features of this experience make it suitable to provide some insights into the law and politics of the internationalization of antitrust policy. In particular, this experience furnishes an example of a successful system of antitrust operating beyond national boundaries, which is supported by a rich political background, especially on the relationship between law and politics.[1] Other important features also exist. These will be alluded to later in the discussion.

The chapter is structured as follows. Part I gives an account of some important introductory issues. Part II describes the role of the European Commission and the European Court of Justice (ECJ) in EC antitrust policy. Part III examines the relationship between EC and domestic antitrust laws, followed by part IV, giving an account of the importance and the influence of EC antitrust law beyond the single market. Part V spells out the implications of the present analysis. Finally, Part VI gives a conclusion.

I. SOME INTRODUCTORY ISSUES

(A) The special characteristics of EC antitrust law

EC antitrust law is thought to be a unique type of law.[2] This uniqueness arises from several facts. First, EC antitrust law is enforced in a special context, namely the goal of market integration and therefore it has a market-integrating aspect.[3] In this context, the law belongs to a wider system, designed to eliminate barriers between states and

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[1] See further below.

[2] See generally D. Gerber *Law and Competition in Twentieth Century Europe* (Oxford, 1998).

[3] See Articles 2 and 3 EC.

enhance the creation of a single market.[4] During the past forty years or so, the law has come to be widely recognized as fundamental to furthering this single market goal,[5] initially in the form of the Common Market and later to establish the Internal Market.[6] Attaining this goal required not only eliminating restraints imposed by Member States, but also ensuring that those restraints would not be replaced by private restraints resulting from the behaviour of private undertakings, because both were considered capable of harming this goal. For this reason, and others, antitrust law was introduced to address such concerns[7] and this has contributed towards antitrust law becoming of central importance in the EC.[8] Secondly, and this is a point that arises from the previous one, associating antitrust law with the single market integration goal has meant that the law has developed in many ways that depart from the "traditional" approach, which can be observed in systems of antitrust in other jurisdictions. This has meant that EC antitrust law was not adopted solely to enhance efficiency and ensure consumer welfare, but also to serve as a "tool" to achieve a wider political goal.[9] Thus, the law has a variety of goals. Thirdly, EC antitrust law reflects a European regulatory approach. Fourthly, and more importantly for the purposes of the present thesis, the EC constituted a "new legal order of international law".[10] Adopting and using antitrust law in this legal order, it is submitted, supplies an

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[4] See Report of American Bar Association on *Private Anti-competitive Practices as Market Access Barriers* (January, 2000).

[5] Many commentators share the view that antitrust policy is regarded as the most fundamental and successful of EC policies. See L. McGowan & S. Wilks "The first supranational policy in the European Union: competition policy" (1995) 28 *E. J. Pol. Res.* 141.

[6] See B. Hawk "Antitrust in the EEC-the first decade" (1972) 41 *Fordham L. Rev.* 229, at p 231; U. Kitzinger *The Politics and Economics of European Integration: Britain, Europe, and the United States* (New York, 1963), at pp 22-58; Commission 23rd Report on Competition Policy (1993). Similar aspirations can also be found in the Cockfield White Paper on the Completion of the Internal Market COM (85) 310, at para. 14.

[7] See Article 3(g) EC which states that the EC shall include "a system ensuring that competition in the internal market is not distorted". To this end, specific rules were adopted in order to deal with different types of harmful private economic behaviour. See in particular the main provisions in Articles 81 and 82 EC, and Regulation 4064/89 EC (The Merger Regulation).

[8] See P. Massey "Reform of EC competition law: substance, procedure and institutions" (1996) *Fordham Corp. L. Inst.* 91.

[9] See M. Mendes *Antitrust in a World of Interrelated Economies: The Interplay Between Antitrust and Trade Policies in the US and the EEC* (Editions de lUniversite de Bruxelles, 1991), at p 74.

[10] This view derives force from the words of the ECJ in its ground-breaking judgment of *Van Gend en Loos*, where it firmly heralded that "the Community constitutes a new legal order of international law

example of the internationalization of antitrust policy. Consequently, it is helpful to draw on the successes or failures of the antitrust experience of this new legal order.

(B) The nature of EC antitrust law

It has been argued that EC antitrust law, like the antitrust laws of many nations, was desired neither by lawyers nor by economists, but by politicians and by "scholars attentive to the pillars of the democratic systems, who saw it as an answer (if not indeed "the" answer) to a crucial problem of democracy".[11]

The involvement of these factors in the creation, and arguably the development, of EC antitrust law supports the view expressed in previous chapters; that it is difficult to divorce antitrust law from a particular political idea at a particular point in time.[12] Furthermore, it supports the view that a study on antitrust law and policy needs to be approached in an *inter-disciplinary* manner.[13] In the case of the EC, this is obvious from the fact that the creation and development of EC antitrust law is as much about politics as law and economics.[14]

There are two additional comments that are worth making in respect of the nature of EC antitrust law and experience. First, despite the fact that the wording of the antitrust provisions in the EC Treaty has not changed for over forty years, the policies

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for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals".

Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

The question of legal personality and nature of the EC has also been considered on other occasions by the ECJ. The following characteristics of the legal order established by the EC have been emphasized by the ECJ. By contrast with ordinary international treaties, the EC created its own legal system which became an integral part of the legal systems of the Member States. By creating a Community of unlimited duration, having its own institutions, its own legal capacity and capacity of representation on the international plane and real powers stemming from a limitation of sovereignty or a transfer of powers, the Member States have limited their sovereign rights. This limitation of Member States sovereignty is permanent. Case 6/64 *Costa v ENEL* [1964] ECR 585, at p 593. See how this view of the ECJ corresponds to EC Legislation. Article 281 EC states that the EC has legal personality, and Article 312 EC states that it has concluded for unlimited duration.

[11] G. Amato *Antitrust and the Bounds of Power* (Hart Publishing, 1997), at p 2.

[12] See pp 35-6 *Ante*.

[13] See pp 19-21 *Ante*. Also, see Dabbah M "Measuring the success of a system of competition law: a preliminary view" (2000) 21 *ECLR* 369, at p 371.

[14] Amato, at p 2, note 11 *Ante*.

underlying its antitrust law have changed according to changes in time and political thinking. These changes reflect the political nature of EC antitrust policy, especially at the level of EC bureaucratic politics. This arises in several situations. One situation which merits mentioning is the adoption of decisions in some antitrust cases,[15] where compromises may be reached between antitrust policy and other types of policies, often industrial policy, within the Commission.[16]

The second comment relates to another made in the introduction to the thesis,[17] that one of the aims of the present study is to examine whether the nature of the internationalization of antitrust policy is a matter of "law" or "politics" (or both). In this regard, considering EC antitrust law experience is crucial because it can provide a subtle ground for this examination. An illustration of this point ensues from EC antitrust law at its inception:

> "German participants tended to see the competition law as fundamentally 'juridical'-legal norms that had to be interpreted and applied according to judicial methods. At the very least, the decade-long controversy over the introduction of a German competition law conditioned German participants to think of Community competition as 'law'.
>
> Decision-makers from other Member States were often inclined to view Articles 85 [now 81] and 86 [now 82] not as 'enforceable law', but rather as programmatic statements of policy intended to guide administrative decision-making of the Commission. Thus the French, for example, tended to see competition law in political and policy terms, preferring to base decisions on the evaluation by Community officials of the needs of the Community and its Member States. They were steeped in the values and methods of *dirigisme* and *planification* which tended to view competition law in that light."[18]

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[15] See further chapter 4 for a discussion on the use of discretion by the Commission, as an example of the political nature of EC antitrust policy.

[16] I. Maher "Alignment of competition laws in the European Community" (1996) 16 *Y. E. L.* 223, at p 229. See also Report of the American Bar Association Sections of Antitrust Law and International Law and Practice on *The Internationalization of Competition Law Rules: Coordination and Convergence* (December, 1999).

Former Commissioner K. van Miert once said, antitrust policy "is politics"; quoted in C. Doern & S. Wilks *Comparative Competition Policy* (Oxford, 1996), at p 254. For an illustration of the kind of compromises in question in the Commission decisional practice, see *Aérospatiale/Alenia/De Havilland* (Case IV/M.053) OJ [1991] L-334/42; [1992] 4 CMLR M2; *Ford/VW* OJ [1993] L-20/14; [1993] 5 CMLR 617.

[17] At pp 19-20 *Ante*.

[18] Gerber, at p 346, note 2 *Ante*. (Footnotes omitted)

This, in turn, raises the issue of seriousness of antitrust law beyond national boundaries. Initially, some Member States believed that EC law, in general, and EC antitrust law, in particular, can be enforced seriously under such circumstances, whilst others held a completely opposite view.

The conclusion to be drawn from the above is that EC antitrust experience provides significant insights into the legal and political dimensions of the internationalization of antitrust policy that can and need to be explained. The EC system of antitrust has developed enormously over the years. However, as will be seen, it has the potential to develop further.

II. INSTITUTIONAL FRAMEWORK

The EC Treaty established new autonomous institutions in order to interpret, apply and enforce EC law.[19] Two EC institutions, namely the ECJ and the Commission, came to play a central role in interpreting and enforcing EC antitrust law.[20] Much of the meaning of EC antitrust law has been provided by these two institutions. As a result, they also provoked the most controversy surrounding its application.[21]

(A) The Commission

The use of law to protect competition in the EC meant the law had to be separated from domestic attributes, since the aim was to deal with private anti-competitive economic activities beyond national boundaries. According to Forrester and Norall,[22] marginalizing the role of Member States in this case and centralizing a new supranational institution was necessary for establishing a "culture of competition" because EC antitrust rules were novel and almost revolutionary. From the beginning, the rules required fundamental changes in deeply ingrained habits of thought and patterns of economic conduct. There was very little trust within the Commission of the business community, lawyers and judges in Member States to apply the rules

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[19] Article 7 EC.

[20] Not, however, the role of the Court of First Instance (CFI), examined at pp 64-5 *Ante*.

[21] For example, the employment of Article 82 EC by the Commission and the ECJ has made it difficult to decipher the aims of the provision. See M. Dabbah "Conduct, dominance and abuse in 'market relationship': analysis of some conceptual issues under Article 82 EC" (2000) 21 *ECLR* 45; V. Korah "*Tetra Pak II*-lack of reasoning in Court's judgment" (1997) 18 *ECLR* 98. Also, see remarks by R. Whish on the "Future of competition policy" in C. Ehlermann & L. Laudati (eds.) *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing, 1998), at p 502.

[22] I. Forrester & C. Norall " The Laicization of Community law: self-help and the rule of reason: how competition law is and could be applied" (1984) 21 *CMLRev.* 11, at p 13.

either correctly or even in good faith.[23] Other reasons for centralizing a new institution in EC antitrust policy can also be identified. These relate to the fact that the Commission had experienced legal and economic experts, which made it a more suitable institution and more qualified to decide cases with legal, economic and political significance. On the other hand, the decision of the founding Member States to hand over responsibilities to the Commission was the result of the economic growth which the EC witnessed in the first fifteen years, which corresponded to the exact aim of the Treaty as expressed in Article 2 EC.

This view is in line with the Commission's own view on the matter. Recently, the Commission has emphasized that in the early years antitrust policy was not a widely known phenomenon throughout the EC. According to the Commission, centralized enforcement of EC antitrust rules was the only appropriate system at the time when the interpretation of EC antitrust law, in particular Article 81(3) EC was still uncertain and when the EC's main objective was to further the goal of market integration. As a centralized institution, the Commission believes that it was enabled to establish uniform application of EC antitrust rules throughout the Member States, promote market integration by preventing the erection of private barriers and create a body of rules acceptable to all Member States and the industry as fundamental to the proper functioning of the single market.[24]

This process of institutional centralization was initiated by Regulation 17/62 EC, a measure that proved to be of great difficulty to draft.[25] The powers of the Commission are rooted in this Regulation, which specifically defines the role of the Commission in EC antitrust policy.[26]

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[23] See M. Hutchings & M. Levitt "Concurrent jurisdiction" (1994) 15 *ECLR* 123; M. Reynolds & P. Mansfield "Complaining to the Commission" (1997) 2 *Eur. Counsel* 34.

[24] See White Paper on "The Modernisation of the rules implementing Articles 85 and 86 of the EC Treaty", (April 28, 1999), at para. 4 (*Paper*).

[25] OJ [1962] 204. See V. Korah *An Introductory Guide to EC Competition Law and Practice* (Sweet & Maxwell, 1994); A. Deringer "The distribution of powers in the enforcement of the rules of competition and the Rome Treaty" (1963) 1 *CMLRev.* 30.

[26] Note, however, the existence of Regulation 4064/89 EC, which upon its enactment rendered Regulation 17/62 inapplicable to Mergers.

(B) The Court of Justice

The ECJ is a strong self-made intellectual leader in EC law in general, and in EC antitrust law in particular. This leadership is partly the result of the ECJ's own conception of its role, partly due to the state of political sclerosis from which the EC suffered from the late-1960s to the early-1980s and partly due to the teleological vision which the ECJ had of the EC and antitrust law.[27]

The ECJ has developed EC antitrust law mainly through advancing the propositions it created over the first two decades following 1957. A major tool in achieving this has been the ECJ's unique interpretative method, namely teleological reasoning.[28] Through this type of reasoning the ECJ considered EC antitrust law within a specific context: the goal of single market integration. The ECJ viewed the availability of a centralized institution – the Commission – to achieve this goal as necessary. To this end, it was willing to interpret EC antitrust law in a specific way in order to enhance the powers of the Commission and place it at the centre *vis-à-vis* Member States and their domestic antitrust authorities. According to Goyder, in doing so, the ECJ provided the Commission with "windows of opportunity" where the ECJ would look beyond the facts of a particular case, confirming its willingness to support particular policy developments of antitrust law by the Commission.[29] By contributing towards the expansion of the prerogatives of the Commission, the ECJ has strengthened EC antitrust law.

The significance of the ECJ cannot be understated. First, in centralizing the Commission in antitrust policy, it can be said that the ECJ adopted a political role. This becomes clear when one considers this issue within a wider framework covering EC law in its entirety, where the ECJ seems to have played a major role toward market integration.[30] Extending the scope of antitrust law towards a wider political

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[27] M. Dabbah "The dilemma of *Keck*: the nature of the ruling and the practical implications of the judgment" (1999) *Irish J. E. L.* 84; D. Gerber "Transformation of European Community competition law" (1994) 35 *Harv. Int'l L. J.* 97, at pp 127-30.

[28] See generally J. Bengoetxea *The Legal Reasoning of the European Court of Justice* (Oxford, 1993); B. Van der Esch "The principles of interpretation applied by the Court of Justice of the European Communities and their relevance for the scope of the EEC competition rules" (1991) *Fordham Corp. L. Inst.* 223, at pp 225-34.

[29] See Goyder D *EC Competition Law* (Oxford, 1998), at pp 578-82.

[30] See P. Craig & G. De Burca *EU Law* (Oxford, 1998), at p 88.

goal, such as market integration, can mean that the act of doing so is political.[31] In light of this, the ECJ seems to have widely assumed a policy-making role. Secondly, the ECJ has played a substantial role in establishing a system of antitrust beyond national boundaries. This fact has some implications for the present study because the internationalization of antitrust policy involves a question of what role the judiciary would play in this process and ultimately in an international system of antitrust.[32]

III. THE RELATIONSHIP BETWEEN EC AND DOMESTIC ANTITRUST LAWS

(A) The issue of influence

The relationship between EC and domestic antitrust laws is normally examined from legal and economic perspectives.[33] In the present thesis however, this relationship is examined from a political perspective as it is believed that the relationship concerns political factors as much as legal and economic ones. The need to consider how EC antitrust law influences domestic antitrust laws is of particular significance for several reasons. One reason that stands out at this stage, relates to the fact that not all Member States had systems of antitrust upon their accession to the EC.[34] In this regard, it is important to consider the role played by the EC system of antitrust in constructing domestic systems of antitrust.

(B) The first twenty-five years: characterizing the relationship

During the first twenty-five years of the EC, the relationship between EC and domestic antitrust laws stood exclusively on a jurisdictional competence criterion.[35]

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[31] See A. Green *Political Integration By Jurisprudence: The Work of the Court of Justice of the European Communities in Political Integration* (Sijthoff, 1969).

The flip-side of this argument is that a political topic has been "judicialized". This would, of course, raise the question whether this is desirable or inevitable. See chapter 8.

[32] See C. Bellamy "Some reflections on competition law in the global market" (1999) 34 *New Eng. L. Rev.* 15. Also, see chapters 4, 8 and 11.

[33] See Massey, at pp 117-21, note 8 *Ante*; J. Temple Lang "European Community constitutional law and the enforcement of Community antitrust law" (1993) *Fordham Corp. L. Inst.* 525.

[34] One such Member State is Italy. See M. Siragusa & G. Scassellati-Sforztine "Italian and EC competition law: a new relationship-reciprocal exclusivity and common principles" (1993) 29 *CMLRev.* 93; F. Romani "The new Italian antitrust law" (1991) *Fordham Corp. L. Inst.* 479; B. Cova & F. Fine "The new Italian Antitrust Act *vis-à-vis* EC competition law" (1991) 12 *ECLR* 20. Also, see the Italian antitrust authority's web site <http://www.agcm.it>.

The applicability of the criterion was determined according to a "two-barrier theory" – introduced by the ECJ early in its jurisprudence.[36] This theory, which defined the respective areas –EC and domestic – of competence, modelled the basic components of the relationship between both sets of laws. It provided that EC antitrust law was applicable wherever there was an effect on interstate trade.[37] Member States were free, however, to apply their domestic antitrust laws to conduct affecting conditions of competition within their individual territories, provided that such action did not conflict with EC antitrust law.

The fact that during this period both laws were applied within two separate spheres of competence did not, however, exclude the possibility of co-ordination amongst these spheres.[38] Yet there was no indication of a strong motive to co-ordinate. This lack of motive can be attributed to several factors, the most important of which was the existence then of certain limitations on the competence of domestic courts to enforce antitrust law generally.[39] Domestic systems of antitrust functioned almost exclusively on the basis of enforcement by administrative institutions.[40] For this reason, those who wished to complain about anti-competitive restraints had little motive to turn to the judiciary to seek a remedy to injury sustained by them as a result of such restraints. They found it easier, less expensive and less uncertain instead to commence legal actions before their domestic antitrust authorities or complain to the

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[35] C. Kirchner "Competence catalogues and the principle of subsidiarity in a European constitution" (1997) 8 *Cons. Pol. Econ.* 71.

[36] Case C-148/68 *Walt Wilhelm v. Bundeskartellamt* [1969] ECR 1.

[37] See J. Faull "Effect on trade between Member States and Community: Member States jurisdiction" (1989) *Fordham Corp. L. Inst.* 485.

[38] In the early-1970s, it was clear that domestic courts could apply most of EC antitrust law. See Case 127/73 *Belgische Radio en Televisie el al v SV SABAM and NV Fonier* [1974] ECR 51, at para. 16 & 17.

[39] See J. Bourgeois "EC competition law and Member States courts" (1994) 17 *Fordham Int'l. L. J.* 331; Forrester & Norall, note 22 *Ante.*

[40] Also, it was obvious that anti-competitive activities of undertakings could affect markets in more than one Member State. Hence, it was not possible for domestic courts to regulate such activities when they affected markets beyond national boundaries.

Commission.[41] Added to this inclination is the fact that the way in which EC antitrust law was supposed to be applied in domestic courts was highly unclear.[42]

Other factors leading to a lack of motive for co-ordination between the two spheres related to the fact that under the centralization system (discussed below) domestic courts were only authorized to apply certain, but not all, parts of EC antitrust law. For example, they were not authorized to issue individual exemptions under Article 81(3) EC, since Regulation 17/62 reserved this power for the Commission's exercise only.[43] This limitation on the ability of domestic courts to apply EC antitrust law in its entirety also discouraged complainants from seeking to enforce EC antitrust law, in particular Article 81 EC, in domestic courts,[44] whilst encouraging them to stay proceedings and seek an exemption from the Commission as a defensive tactic.

These limitations on the competence and jurisdiction of domestic courts did not mean that co-ordination between EC and domestic spheres of competence were not possible through other channels. One option was for domestic antitrust authorities to enforce EC antitrust law.[45] However, the fact that domestic antitrust authorities also lacked competence to grant exemptions under Article 81(3) EC,[46] combined with some of them lacking even authority under their domestic laws to apply EC antitrust law in the first place meant that this option was even less popular than the courts' option.

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[41] See R. Whish "Enforcement of EC Competition law in the domestic courts of Member States" (1994) 15 *ECLR* 60, at pp 61-2; L. Hiljemark "Enforcement of EC Competition law in national courts- the perspective of judicial protection" (1997) *Y. E. L.* 83.

[42] See D. Hall "Enforcement of EC competition law by national courts" in P. Slot & A. McDonnell (eds.) *Procedure and Enforcement in E.C. and U.S. Competition Law* (Sweet & Maxwell, 1993), at p 42; L. Ritter *EEC Competition Law-A Practitioner's Guide* (Kluwer, 1991), at p 718; G. Cumming "Assessors, judicial notice and domestic enforcement of Articles 85 and 86" (1997) 18 *ECLR* 370; C. Kerse *EC Antitrust Procedure* (Sweet & Maxwell, 1994), at pp 81-2; C. Kerse "The complainant in competition cases: a progress report" (1997) 34 *CMLRev.* 230; I. Van Bael "The role of national courts" (1994) 15 *ECLR* 6.

[43] See Article 9 of the Regulation.

[44] Even if a domestic court found the Article 81 EC prohibition applicable, the defendant undertaking might be able to convince the Commission to issue an exemption and thus render the legal action meaningless.

[45] Notice on Co-operation between the Commission and National Competition Authorities in handling cases falling within the scope of Article 85 and 86 EC (the "Notice") OJ [1996] C-262/5, at p 13.

[46] It was obvious that a domestic antitrust authority might expend its resources to bring an action under Article 81(1) EC over which it did not have ultimate control. See M. Fernandez Ordóñez "Enforcement by national authority of EC and Member States' antitrust law" (1993) *Fordham Corp. L. Inst.* 629.

(C) The second twenty-five years: the centralization and decentralization debate

The relationship between EC and domestic antitrust laws, including the division between their respective spheres of competence received little attention in the period between 1957 and early-1980s, whether in the legal literature or on the agenda of the Commission officials.[47] On the basis of this situation, there was hardly any consideration of whether a change in the formal relationship was necessary in terms of expanding the co-ordination between EC and domestic spheres of competence.

From the mid-1980s however a change of thought regarding this relationship began to appear on the horizon.[48] In particular, the revival of the process of market integration, as marked by the introduction of the Single European Act (SEA) 1986, indicated that it was no longer possible to maintain a formal division of competence. This development brought into question the criterion of jurisdictional competence as a determining factor in the relationship between EC and domestic antitrust laws. The process of market integration in the EC was deepening and this raised the issue of the need for a fundamentally more co-operative and integrated framework for EC law in general, and for antitrust law in particular. This spawned the existence of what has materialized as a central debate in EC antitrust law and policy, namely the centralization/decentralization debate.

1. Centralization

Centralization is essentially a centripetal process which, in the early years of the EC, suggested that power should be concentrated at the EC level. Different factors led to this perspective. One motivation was the concern on the part of officials of the Commission at the dawn of the Treaty to pool power in Brussels and marginalize the role of Member States and their domestic antitrust authorities in antitrust policy. Another reason emerged from the goal of single market integration. The common feeling, in the light of this goal, was that EC antitrust law and institutions had to gradually move towards the heart of the antitrust policy scene in the EC. Hence,

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[47] It seems that the reason for this relates to the economic difficulties during that period, with the Oil Shock, as well as political scelosis at international level generally.

[48] During this period, there was a change of economic conditions and political consensus within the EC was growing.

domestic antitrust laws were pushed to the side and were confined to dealing with antitrust policy issues that raised concerns within their national boundaries.[49]

2. Decentralization

Against the above perspective of centralization stands a centrifugal process that calls for the delegation of authority to the national level. This process is known as decentralization. The process has entered the EC antitrust policy scene since the mid-1980s,[50] when the Commission began to properly consider the need to involve domestic courts and domestic antitrust authorities in applying EC antitrust law.[51] Several factors contributed to this trend. Most significantly, it was apparent that the Commission was unable to meet its responsibilities under the system because: first, there was lack of resources, mainly caused by financial and political factors;[52] and secondly, there was the possibility (one may say it was a fact) that the EC in the mid-1980s was going to expand geographically.[53]

Major events that took place in the late-1980s and early-1990s made the case for decentralization even more pressing. These events included the collapse of the Soviet

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[49] This development seems to have been confirmed by introducing the Merger Regulation, Regulation 4064/89 EC in 1989. The Regulation authorized the Merger Task force of the Commission to take mergers with political economic and legal significance out of the control of domestic antitrust authorities.

[50] Prior to this, the Commission was hesitant about decentralization, because: first, it was thought that it would reduce the capacity of EC institutions to influence the development of EC system of antitrust; secondly, it would afford Member States the opportunity to use it to further their own objectives and individual interests; and thirdly, it would increase the risk of inconsistencies within the system. See J. Meade "Decentralisation in the implementation of EEC Competition law-a challenge for the lawyers" (1986) 37 *N. I. L. Q.* 101.

[51] See Commission 13th and 15th Reports on Competition Policy (1983) and (1985), at paras. 217 and 38 respectively.

[52] See Hiljemark, at p 87, note 41 *Ante*.

[53] In 1986 Spain and Portugal acceded to the EC, and the accession of more countries such as Sweden, Finland and Austria was appearing on the horizon. Also, the accession programme included countries which upon acceding to the EC had either no antitrust law or had systems of antitrust at a very early stage of development. This meant that undertakings and future officials in those countries would have to be informed about antitrust law concepts, and this would cause an increase in both the financial and educational burdens of the Commission.

Union in 1989,[54] the signing of the Treaty on European Union (TEU) in 1992[55] and the impending accession of more states during that period.[56]

(i) The types and meanings of decentralization

Three different types of decentralization with three corresponding meanings can be identified:

(a) The application of EC antitrust law by domestic courts

This variant of decentralization calls for further involvement of domestic courts in interpreting, applying and enforcing EC antitrust law. The Commission regarded increasing the function of domestic courts as a good way to deal effectively with the problem of its extensive caseload whilst simultaneously foster awareness of and enhancing compliance with EC antitrust law at the national level. In addition, decentralization in this manner was also desirable, since no change to the "two-barrier theory" was necessary, nor would the Commission be forced to loosen its grip on EC system of antitrust.

This type of decentralization became apparent in the early-1990s, with the Commission concentrating its earlier efforts to encourage bringing legal actions before domestic courts rather than having complainants go to Brussels to seek a remedy.[57] These efforts were concluded later in a Notice concerning Co-operation Between the Commission and Courts of the Member States With Regards to the

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[54] The changing situation in Central and Eastern Europe meant that the EC had to at least consider the possibility of expanding its membership to include certain Central and Eastern European Countries where the concepts of competition and antitrust law were unfamiliar. See pp 102-12 *Post*.

[55] The TEU introduced the principle of subsidiarity under Article 5 EC, which provides the EU should not regulate conduct that could be regulated at least as effectively at the national level. The principle of subsidiarity did not require changes in the EC system of antitrust. However, it has played a central role in the relationship between EC and domestic antitrust laws, and in this form it entered the centralization/decentralization debate. See B. Francis "Subsidiarity and antitrust: the enforcement of European competition law in the national courts of Member States" (1995) 27 *Law and Pol'y in Int'l Bus.* 247; R. Alford "Subsidiarity and competition: decentralized enforcement of EU competition laws" (1994) 27 *Corn. Int'l L. J.* 275; R. Wesseling "Subsidiarity in Community law: setting the right agenda (1997) 22 *ELRev.* 35.

[56] See notes 53 and 54 *Ante*.

[57] C. Ehlermann, "The European Community, its law and lawyers" (1992) 29 *CMLRev.* 213, at p 225.

Application of Articles 85 (now Article 81) and 86 (now Article 82) EC, issued by the Commission in 1993.[58]

Several purposes seem to underpin the Notice.[59] First, it highlights both the Commission's efforts to encourage private actions and the importance the Commission attaches to the issue of compliance.[60] Secondly, it strongly heralds the principle that cases with no particular political, economic or legal significance for the EC should, as a general rule, be handled by domestic courts or antitrust authorities.[61] Thirdly, the Notice offers procedural guidelines for domestic courts to follow in handling the application of EC antitrust law. The Notice specifies the factors that domestic courts should consider when deciding cases and the steps they should take.[62] Essentially, domestic courts are directed under the Notice to base their decisions on EC antitrust law to the extent it is possible for them to predict how the Commission, and possibly EC courts, would decide the antitrust dispute.[63]

During the first year of its existence, the Notice triggered some scepticism over whether it would generate a significant increase in utilizing domestic courts. This doubt was based on the view that neither the Notice itself, nor any other relevant Commission actions, change the basic attitude of undertakings with regard to the risks and uncertainties attached to legal actions brought before domestic courts.[64] As a matter of fact, this scepticism has continued throughout the Notice's existence. There

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[58] OJ [1993] C-39/6. Some have argued that the Notice was a reaction on the part of the Commission for lack of response to the intensification of its earlier efforts. See R. Wesseling "The Commission notices on decentralisation of E.C. antitrust law: in for a penny, not for a pound" (1997) 18 *ECLR* 94.

[59] See A. Riley "More radicalism, please: the Notice on Co-operation Between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty" (1993) 14 *ECLR* 93.

[60] See paras. 15 and 16 of the Notice.

[61] Note the coincidence in timing in introducing the Notice and the subsidiarity principle which seemed to suggest that the Commission was here applying the principle within EC antitrust law. See para. 14 of the Notice.

[62] See paras. 17-32 of the Notice.

[63] The Notice recommends that domestic courts take into account in addition to the judgments of EC courts, the decisional practice of the Commission under the block exemptions. The understanding seems to be that the more legal territory these exemptions cover, the less serious an obstacle it is that domestic courts cannot issue individual exemptions under Article 81(3) EC. The Notice indicates that the Commission will actively use this mechanism as a means of furthering decentralization.

[64] See C. Ehlermann "Implementation of EC competition law by national antitrust authorities" (1996) 17 *ECLR* 88, at p 89.

is no doubt that some hurdles still remain in the face of this type of decentralization, such as those relating to domestic courts' lack of competence to issue individual exemptions.[65] Despite this scepticism, it can be said that, on the whole, the Notice is a positive step forward in co-ordinating the relationship between the Commission and domestic courts.

(b) The application of Community antitrust law by domestic antitrust authorities

The second variant of decentralization relates to domestic antitrust authorities directly enforcing EC antitrust law. For many years, there was relatively little incentive on the part of the Commission to advance this variant.[66] Several reasons may be professed for this lack of enthusiasm. First, for a number of years the Commission viewed this variant of decentralization as complex and more uncertain than decentralization via domestic courts. The Commission thought this option would have rendered inevitable orchestrating the relationship between domestic antitrust authorities and itself – through co-ordination in the decision-making between officials of those authorities and its own officials. This was seen as risky because each set of officials enjoys a degree of discretion and each is receptive to policy considerations and responds to pressures of the system of antitrust within which it operates.[67] The second reason is that domestic antitrust authorities showed little interest to enforce EC antitrust law rather than their own domestic antitrust laws.[68]

Despite this obvious reluctance by the Commission to pursue this variant of decentralization, and the equally evident lack of incentive on the part of domestic antitrust authorities to apply EC antitrust law, the Commission issued a Notice on Co-

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[65] G. Marenco "The uneasy enforcement of Article 85 E.E.C. as between Community and national levels" (1993) *Fordham Corp. L. Inst.* 605.

[66] During the first twenty-five years of the EC, this option was not realistic. Most domestic antitrust authorities had limited resources and experience. Furthermore, not all domestic antitrust authorities were authorized under their domestic laws to apply EC antitrust law. Some Member States, notably Italy, did not even have systems of antitrust, let alone the fact that major differences existed between national antitrust laws and EC antitrust law. See Temple Lang, at pp 571-5, note 33 *Ante*.

[67] The Commission also thought that this could impose significant additional costs on the Commission as well as interfere with its capacity to control efforts to protect competition in the EC.

[68] To a certain extent, this is understandable because they lack competence to issue individual exemptions under Article 81(3) EC. They are primarily responsible for the development and enforcement of their own domestic antitrust laws, and their competent performance is likely to be judged in light of the fulfilling of this task.

operation Between the Commission and National Competition Authorities in Handling Cases Falling within the Scope of Article 85 (now Article 81) and 86 (now Article 82) EC (the "Notice") in 1996.[69] The Notice, which indicates the willingness of the Commission to consider seriousiy this type of decentralization, specifically refers to the principle of subsidiarity (the allocation of competence principle) as a justification for increased transfer of competence, albeit in a limited manner, to domestic antitrust authorities.[70] Whilst clearly of value, this allocation of competence principle – as introduced in the Notice – is limited in terms of its sphere of operation and application, mainly due to the lack of competence of domestic antitrust authorities to grant exemptions under Article 81(3) EC.

The Notice shows that the Commission has come to recognize the importance of co-operation with domestic antitrust authorities. It shows the benefit of such co-operation, especially to avoid duplication of antitrust enforcement.[71] The Notice does not, however, fundamentally change the attitude of domestic policy makers to think more positively with regard to the process of decentralization. It is clear, in light of the Notice, that making this type of decentralization more viable requires further significant steps on the part of the Commission towards consolidating its efforts in this direction.[72]

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[69] OJ [1996] C-262/5.

[70] The Notice states that "if, by reason of its scale or effects, the proposed action can best be taken at Community level, it is for the Commission to act. If, on the other hand, the action can be taken satisfactorily at national level, the competition authority of the Member State concerned is better placed to take it".

In light of this allocation principle, the competence of the Commission or the relevant domestic antitrust authority to act is determined by the size and effect of the agreement.

Regarding cases in which the allocation principle is applicable, the Commission takes the position that where the main effects of conduct are within one Member State, the domestic antitrust authority of that state may handle the case. Nevertheless the Commission reserves the right to take a case where it considers that it has important political, economic or legal significance – for example, if it raises new points of law or if it involves conduct in which another Member State has a particular interest. See Commission 25th Report on Competition Policy (1995). This position seems to be confirmed by Commission's Paper on modernization, note 24 *Ante*. See pp 96-8 *Post*.

[71] The Notice aims to avoid the possibility that domestic antitrust authorities will expend effort and resources in cases which the Commission ultimately takes out of their area of competence.

[72] See pp 96-8 *Post*.

(c) Domestic authorities applying their own antitrust laws

A third variant of decentralization is for domestic antitrust authorities to continue to apply their own domestic antitrust laws, but to do so more increasingly.[73] Naturally, this variant of decentralization has been little discussed, mainly because the Commission and the antitrust community always used the term decentralization to mean only the decentralized application of EC antitrust law.[74] Nevertheless, two reasons can be advanced to explain why this variant should also be considered. First, it responds to the values and concerns attached to the principle of subsidiarity. These values and concerns reduce the centralization of power at EC level and increase the authority of Member States to protect competition, where they can do so, at least as effectively as the Commission. Secondly, to the extent that domestic antitrust authorities satisfactorily protect competition by relying on domestic antitrust laws, the Commission would accomplish its objectives without drying up its resources any further.[75]

In spite of the above factors, it can be argued that an increased reliance by domestic authorities on their domestic antitrust laws is controversial. First, for over a fifty-year the Commission has sought to establish EC antitrust law as the basis of market integration. It seems that an increased reliance on domestic antitrust laws would reverse this process. Secondly, it reduces the superiority and authority of the Commission. Affording domestic antitrust authorities the opportunity to advise the business community, make important commercial decisions and decide on the norms to be followed by undertakings would pose a threat to the superiority of the Commission. Thirdly, the Commission doubts the extent to which domestic antitrust laws may be relied on to protect competition at least as satisfactorily as EC antitrust law. Fourthly, restrictions on competition often have a cross border effect. Therefore, these restrictions might infringe the laws of more than one Member State and thereby create conflicts among Member States as well costs in both time and resources.

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[73] See P. Bos "Towards a clear distribution of competence between EC and national competition authorities" (1995) 16 *ECLR* 410.

[74] For example, the Commission's policy has always been to strengthen the role and effectiveness of EC antitrust law, and increased reliance on domestic law is a step in the opposite direction.

[75] Increased reliance on domestic antitrust laws in such cases may also avoid many of the difficulties that arise when the Commission and one or more domestic antitrust authority apply EC antitrust law.

Fifthly, a Member State is not necessarily able to address effectively restrictions which have effects in more than one Member State, because it is not guaranteed that it will have unlimited, or even in some cases sufficient, access to information and evidence in other Member States.[76]

It is suggested, however, that the concern triggered by these factors can be eliminated to the extent that domestic antitrust authorities would enforce similar substantive antitrust rules in similar ways. There is no doubt that the closer domestic systems of antitrust are, the easier it should be to develop means of distributing authority between the Community level and the domestic level, especially in difficult cases and those involving regulating evidentiary matters. Furthermore, the more similar these systems are, the more meaningless the distinction between EC and domestic antitrust laws becomes. The net result in applying domestic antitrust law by domestic antitrust authorities will be less objectionable.

(ii) The convergence of domestic antitrust laws: a closer relationship

The renewed confidence between the mid-1980s and the early-1990s in achieving the goal of single market integration – as evidenced through the introduction of the SEA and the TEU in 1986 and 1992 respectively – opened a new chapter in the EC antitrust policy scene. Since that time, several Member States have either introduced new systems of antitrust similar to the EC model or altered their systems so as to bring them more into line with that model.[77] Interestingly, this recent shift toward

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[76] There is also the argument that increased reliance by domestic antitrust authorities on their domestic laws can undermine the supremacy of EC antitrust law and the values of the one-stop shop principle.

[77] Recently, the UK has reformed its antitrust law in this manner. The new law adopted Articles 81 and 82 EC standards, but maintained the "public policy" standard in merger control. See the UK Competition Act (1998), which came into force on March 1, 2000. For a good account of the new Legislation see B. Rodger & A. MacCulloch *The UK Competition Act* (Hart Publishing, 2000); P. Freeman & R. Whish *A Guide to the Competition Act 1998* (Butterworths, 1999); S. Singleton *Blackstone's Guide to the Competition Act 1998* (Blackstone, 1999). Also, see UK Office of Fair Trading's Web site <http://www.oft.gov.uk> and the UK Competition Commission's web site <http://www.mmc.gov.uk>.

In its 25th Report on Competition Policy (1995), at p 36 the Commission stated that convergence of domestic antitrust laws has taken place in nine different Member States.

Whilst the present discussion will not attempt to deal with the situation in individual Member States, it will attempt to offer more than general comments on the relationship between EC and domestic antitrust laws. See the following literature on the situation in individual Member States, P. Wessman "Competition sharpens in Sweden" (1993) 17 *World Comp.* 113; J. Ratliff & E. Wright "Belgian competition law: the advent of free market principles" (1992) 16 *World Comp.* 33; S. Martinzez Lage "Significant developments in Spanish antitrust law" (1996) 17 *ECLR* 194; T. Liakopoulos "New rules

greater convergence has been the result of initiatives on the part of certain Member States rather than the result of the decentralization efforts on the part of the Commission.[78]

Several factors have contributed towards the convergence of domestic antitrust laws. In particular, three main factors are worth mentioning. The first are economic factors. The arguments of business undertakings in different Member States have emphasized that they and interstate commerce would benefit from operating under uniform antitrust rules in different Member States.[79] Secondly, the willingness on the part of domestic antitrust authorities to learn from each other has increased, especially since the late-1980s. Thirdly, there has been a growing recognition throughout Europe of the value of competition. This can be seen from the way that the market mechanism has become more dominant, which has made it necessary to adopt measures to protect its dynamics and ensure its proper functioning. To some extent, this has presented an ideological shift. It has also reflected a growing awareness of the need for economic reinvigoration throughout Europe and that increased competition was the most likely means of fostering strong and healthy economic environment.

(a) Types of convergence

There have been two different types of convergence. The first is textual convergence,[80] under which there has been an increase in following the framework of

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on competition law in Greece" (1992) 16 *World Comp.* 17; K. Stockmann "Trends and developments in European antitrust laws" (1991) *Fordham Corp. L. Inst.* 441, at pp 448-69. Also, Commission 28th Report on Competition Policy (1998), at pp 329-57.

[78] Accommodating EC-like type of antitrust rules enabled a Member State to demonstrate its support to Member States, such as France and Germany, who were pursuing further integration, and such a Member State could expect that its support would be appreciated by supporters of these initiatives. Countries seeking future accession to the EC in the early-1990s, expressed an interest to "converge" their laws. Sweden, Austria, and Finland were in various stages of accession, and by enacting antitrust laws similar to EC antitrust law they could demonstrate their support for the integration efforts of existing Member States and of EC institutions.

[79] The intensifying battle for foreign investment among Member States also created incentives for business undertakings to follow the domestic legal environment that was not significantly different and more stringent than that of the EC. The "definite" possibility in the early-1990s that certain countries were likely to accede to the EC added more vigour to the views of business community. Also, the present possibility that in ten years, the EC may have 25 Member States, as opposed to 15, strengthens such arguments.

[80] H. Ullrich "Harmonisation within the European Union" (1996) 17 *ECLR* 178.

Articles 81 and 82 EC. In some cases, some domestic laws, such as the French law,[81] merely followed the basic framework of these provisions, whilst others, such as the Swedish laws, adopted their terminology.[82] The second is institutional and procedural convergence. In this sense, viewing the EC system of antitrust as a model for convergence is more ambitious than its textual counterpart. Nevertheless, general patterns of change at the institutional level have been to move towards more judicial characteristics and institutions that are inclined towards more judicial roles in domestic systems of antitrust. They have adopted roles that involve interpretation, application and enforcement of antitrust provisions at the national level, unlike the administrative control regimes which previously existed in the Member States concerned. To this end, domestic antitrust authorities have increasingly, for example, been given greater independence from political influence.

(b) Stages of convergence

Convergence mainly involves two stages. The first is the adoption at the national level of similar patterns of convergence towards EC antitrust law. The second stage concerns efforts to co-ordinate EC and domestic systems of antitrust. The developments which these stages may lead are salient. It can be expected that the interaction between these stages will play a central role in shaping the future relationship between EC and domestic antitrust laws. Further integration within the EC calls for an increasingly integrated system of antitrust. The interaction of the stages of convergence may help to clarify the future dynamics of this system and its different components.[83] This is all the more likely, since it is not clear whether the components – EC and domestic – of the system will operate on a closely integrated basis or whether mere formal jurisdictional rules will link these components together.[84]

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[81] See generally F. Jenny "French competition law update: 1987-1994" (1995) *Fordham Corp. L. Inst.* 203. For information on the French system of antitrust law see Director General's web site, <http://www.finances.gouv.fr/DGCCRF/index-d.htm> and the Competition Council's web site, <http://www.finances.gouv.fr/conseilconcurrence>.

[82] See M. Widegren "competition law in Sweden – a brief introduction to the new legislation" (1995) *Fordham Corp. L. Inst.* 241.

[83] See generally Maher, note 16 *Ante.*

[84] See generally Temple Lang, note 33 *Ante.*

It is not difficult to identify the picture that seems to be emerging in the light of this closer relationship between EC and domestic systems of antitrust. The emerging antitrust landscape places the EC system at the heart of the development of antitrust policy and principles in the EC and provides a centre to which domestic systems of antitrust are primarily connected. The "two-barrier theory" will continue to constitute a key element, as the question of competence to investigate and decide in a particular antitrust law case – the Commission or the relevant domestic antitrust authority – will continue to be a central issue. This is a difficult (and largely political) issue because the Commission's power and authority may be threatened with the involvement of domestic antitrust authorities. This means that political conflicts will be located along that decisional edges. Moreover, it is a political issue because decision-makers in the EC and in Member States are generally committed to different and sometimes inconsistent policy and personal objectives.

(c) System structure: horizontal and vertical co-operation

Two dimensions are surfacing in the relationship between EC and domestic systems of antitrust. The first may be referred to as "vertical co-operation". This dimension includes factors such as the extent to which Commission officials and those in domestic antitrust authorities share common interests and forge institutional means to pursue and protect such interests. Whilst policy-makers at either level share the common goal of protecting the process of competition, they often diverge with regards to the best means of achieving this goal. Also, it is not clear whether their interests coalesce with regard to other goals and values. In this way, establishing a common intellectual and communicative base for pursuing common interests between the EC and domestic systems of antitrust is a daunting project to undertake.

The second dimension may be termed "horizontal co-operation". This dimension connotes the prospects of domestic antitrust authorities creating close links between themselves. This depends on the extent to which they perceive common interests. Also, the extent to which they are willing and able to create means to pusue such interests – independently of the "vertical dimension" – will be another important factor in this regard.

(d) A Comment

For many years, there has been little awareness of the importance of these dimensions. This is mainly due to the fact that until recently antitrust law has been examined exclusively from the perspectives of individual – EC or domestic – systems of antitrust. Hence, few, including lawyers, economists and policy-makers, have good knowledge of similar experiences and common and shared problems and solutions between the different systems.[85]

The foregoing discussion demonstrated, however, that this situation has been changing and more attention is being drawn to the importance of these dimensions. Of course it is difficult to predict with sufficient certainty whether this importance will increase, and the degree to which these dimensions may integrate with each other. It is quite likely that this will be influenced by factors that are exogenous to the EC system of antitrust. These include factors such as the accession of third countries to the EC. The issue of accession in this regard depends on the countries that will accede, when they will accede and on the type of economic, political and legal traditions that will accompany their accession.[86]

Factors endogenous to the system will also be influential. One important endogenous factor that is likely to prove influential, concerns changes in global economic climate, and how far do these go.[87] Another important factor is how Member States perceive the EC system of antitrust. If the system is viewed as successful and useful, this will create incentives for Member States to move their own systems of antitrust closer to it, which means that the system will be likely to win support, force and influence. This is also likely to be mutually valuable, as the EC and domestic systems will support each other. If, on the other hand, a view to the contrary is held by the Member States, then it will be less likely they would take such steps.[88] The issue of perceptions by

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[85] Gerber, at p 3, note 2 *Ante*.

[86] See L. Ramsey "The implications of the Europe agreements for an expanded European Union" (1995) 44 *Int'l Comp. L. Q.* 161.

[87] See chapter 10.

[88] A major challenge for the Commission is likely to be whether it can manage its relationship with domestic antitrust authorities in a manner which would avoid creating incentives for the latter to define their own interests in opposition to it or to one another. To this end, the effectiveness of the "vertical dimension" seems to be a key factor in shaping incentives for the "horizontal dimension".

Member States demands careful examination in order to ensure a comprehensive and reasoned analysis and to avoid politically motivated assumptions, which may be harmful.

The relationship between EC and domestic antitrust laws should be seen to reside at the heart of the goal of market integration. Effective co-ordination between EC and domestic systems of antitrust is likely to foster this goal. This will also enhance the influence of the EC system of antitrust beyond the borders of the EC. Hence, it is important to support the co-ordination efforts in order to avoid any adverse effect on the image the EC system of antitrust within and outside the EC.

(D) Recent developments

On April 28, 1999, the Commission introduced its White Paper on the Modernisation of the Rules Implementing Articles 85 (now Article 81) and 86 (now Article 82) EC (Paper).[89] The Paper presents a fundamental rethink by the Commission on the EC system of antitrust "which has worked so well" but which "is no longer appropriate for the Community of today with 15 Member States, 11 languages and over 350 million inhabitants".[90] The Commission offers in the Paper some reasons for the proposed revision – albeit in incomplete terms. At paragraph 5 of the Paper, the Commission provides that the reasons for this rethink reside in Regulation 17/62 "and in the external factors to the development of the Community". Furthermore, at paragraph 10 of the Paper, the Commission explains that the current system is no longer adequate to meet the new challenges facing the EC. The Commission believes that it is essential to adapt the current system in order to remedy the present problem of resources, relieve business undertakings from unnecessary costs and bureaucracy, to enable the Commission to pursue more serious antitrust law infringements and to stimulate a simpler and more efficient system of control.

According to the Commission, the time has now come when the responsibility of enforcing EC antitrust law, including a determination of whether the criteria of Article

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[89] OJ [1999] C-132/1, [1999] 5 CMLR 208.

[90] See para. 5 of the Paper.

81(3) EC are satisfied, should be by domestic courts and antitrust authorities.[91] It therefore proposes that the notification and exemption system in Regulation 17/62 should be abolished and replaced by a Council Regulation which would render the criteria in Article 81(3) EC directly applicable without a prior decision of the Commission. This proposal would leave the Commission in a position to concentrate its priorities, such as combating cartels with trans-national operations and effects. This does not, of course, mean that the Commission would relinquish being the guardian of EC antitrust rules. On the contrary, the Commission makes it clear in the Paper that it will continue to observe how these rules are applied by domestic courts and antitrust authorities. This will involve asserting jurisdiction in particular cases, namely those with legal, economic and political significance for the EC.

The proposals of the Commission are radical, especially the Commission's proposal to abandon its monopoly to grant Article 81(3) EC exemptions. However, for undertakings and those advising them, ending the notification and authorization system provides a relief. One of the problems with the current system has been that, for the majority of agreements, obtaining an individual exemption from the Commission required a notification to it. The Commission has suffered for many years from lack of resources and shortage of staff to keep up with the increasing number of notifications and for this reason the system is flawed.[92] The proposals in the Paper have the effect of abandoning the notification procedure completely. Notification will not be possible. Undertakings will be responsible for making their own assessment of the compatibility with EC antitrust law of their restrictive practices in the light of the relevant legislation and case-law.[93]

Abandoning notification will be an issue of particular challenge to undertakings and their legal advisors. This will help to harmonize the position of the EC on antitrust policy exemptions to that in the US, where undertakings have to be more self-reliant. It is to be anticipated that this issue, along with many other more detailed points of

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[91] Domestic courts and antitrust authorities would be able to apply Article 81 EC in its entirety, rather than just Article 81(1) EC and the provisions of the block exemptions, as now.

[92] One can of course argue that in spite of this, the system sill provided for notification for those who wish to notify.

[93] See para. 77 of the Paper.

law and practice, will be debated for a considerable time to come. Recently, a draft for Council Regulation on the implementation of Articles 81 & 82 EC has been produced.[94] The draft contains very important proposed provisions on the relationship between EC and domestic systems of antitrust. In particular, Article 11 of the proposed Regulation deserves mentioning. According to this provision, which deals with co-operation between the Commission and domestic antitrust authorities and courts, the application of EC antitrust rules will be on the basis of close co-operation between the two sides. The provision also states that national antitrust authorities and courts are required to inform the Commission at the outset of any proceedings involving the application of Articles 81 and 82 EC opened by them. Furthermore, domestic antitrust authorities and courts are expected to consult the Commission prior to adopting a decision under these provisions requiring an infringement be terminated, accepting commitments by undertakings or withdrawing the benefit of one of the block exemptions. This obligation includes submitting to the Commission no later than one month before a decision is adopted a summary of the case and any related important documents. The Commission also preserves the right to request any other relevant documents. Finally, the provision states that where the Commission has decided to initiate proceedings, domestic antitrust authorities will be relieved of their competence to apply Article 81 and 82 EC.

IV. THE SIGNIFICANCE AND INFLUENCE OF EC ANTITRUST LAW BEYOND THE SINGLE MARKET

Through its supranational position and international outlook more generally, the Commission has been seeking co-operation with other antitrust authorities in the world, as well as stretching the influence of EC antitrust law internationally, by exporting its concepts and ideas. This has been happening on different fronts, including: first, concluding bilateral agreements with antitrust authorities in third countries, formalizing co-operation in the enforcement of their antitrust laws; secondly, encapsulating antitrust rules in the European Economic Agreement (EEA);[95] thirdly, approximating antitrust laws in Association Agreements between the

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[94] COM (2000) 582.

[95] See J. Stragier "The competition rules of the EEA agreement and their implementation" (1993) 14 *ECLR* 30.

EC and European and Baltic Countries and in Partnership and Co-operation Agreements with other countries;[96] and fourthly, proposing international initiatives at a multilateral level.[97]

(A) Bilateral perspective: The EC/US relationship

1. A framework of co-operation

The co-operative relationship between the EC and the US in antitrust policy is governed by the bilateral agreement of September 23, 1991.[98] The agreement provides for co-operation in respect to several aspects of EC and US antitrust laws.[99] It has the benefit, including the opportunity, for the parties to exchange views in all cases of mutual interest and, when appropriate, to co-ordinate enforcement activities.[100] More importantly, the agreement introduced the principle of "positive comity".[101] Under this principle, one party to the agreement (known as the requesting party) can ask the other party (known as the requested party) to address anti-competitive behaviour, within the latter's boundaries, which has an effect on the interests of the former.

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[96] See Commission's 25th Report on Competition policy (1995), at para. 221; D. Kennedy & D. Webb "The limits of integration: Eastern Europe and the European Communities" (1993) 30 *CMLRev.* 1095, at p 1113.

[97] See p 112 *Post.*

[98] See OJ [1995] L-95/45 as corrected by OJ [1995] L-131/38.

The literature on the issue of bilateral co-operation between the Commission and the US antitrust authorities is abundant. See K. van Miert "International cooperation in the field of competition: a view from the EC" (1997) *Fordham Corp. L. Inst.* 13, at pp 16-25; J. Parisi "The EC-US Agreement regarding the application of their competition laws: another step towards fostering international cooperation in antitrust enforcement", address before the European Trade Law Association (Brussels, December, 1991); D. Ham "International cooperation in the antitrust field and in particular the agreement between the United States and the Commission of the European Communities" (1992) 30 *CMLRev.* 571; J. Griffin "EC/US antitrust cooperation agreement: impact on transnational business" (1993) 24 *Law & Pol'y Int'l. Bus.* 1051.

[99] See in particular Articles II-V of the agreement. Article II deals with the need to notify the other party whenever it becomes apparent to one party that its enforcement activities are likely to affect the interests of the other. Article III deals with exchange of information between the parties. Article IV deals with co-ordination of enforcement activities between the parties. Article V deals with the important issue of "positive comity".

[100] See A. Haagsma "International competition issues: the E.C.-U.S. agreement of September 23, 1991" in Slot & McDonnell, at p 229, note 42 *Ante.*

[101] See D. Conn "Assessing the impact of preferential trade agreements and new rules of origin on the extraterritorial application of antitrust law to international mergers" (1993) 93 *Columbia L. Rev.* 119, at p 148; C. Ehlermann "The international dimension of competition policy" (1994) 17 *Fordham Int'l. L. J.* 833, at p 836.

Co-operation under this agreement has generally been quite close and productive for the last nine years.[102] A good example in which co-operation was seen as important is the *CRS/SABRE* case. In this case, the US Department of Justice requested the Commission to investigate activities within the computer reservation system markets (CRS) that were suspected of hindering the ability of US based CRS undertakings from competing effectively in certain European markets. A claim was made by SABRE, owned by American Airlines, that the anti-competitive behaviour of the three large airline owners of Amadeus on the European side of the Atlantic, the leading CRS, impeded its ability to penetrate markets in Europe.[103]

The US Department of Justice decided to make a positive comity referral on the basis of the co-operation agreement between the EC and the US. J. Klein said that the Commission was in the best position to investigate this conduct because it occurred within the EC and consumers there are the ones who are principally at risk if competition has been distorted.[104] By contrast, A. Schaub believed the case was "important psychologically". In its investigation, the Commission treated this as a priority case because it was aware of the fact that how it handles US positive comity referrals will certainly determine largely how the US antitrust authorities will handle its referrals. [105]

In 1997 the Commission began an "initial inquiry", which lasted for two years. This was followed in March 1999 by a formal proceeding against Air France, one of the three European airline owners of Amadeus named in the US request. The

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[102] In the period from January 1995 to December 1996, for example, there were varying degrees of co-operation in nearly one hundred cases. See J. Griffin "EC & U.S. extraterritoriality: activism & cooperation" (1994) 17 *Fordham. Int'l L. J.* 353. Note, however, the *Boeing/McDonnell Douglas* case, which indicates that this has not always been the case. See OJ [1997] L-336/16. Yet, the recent *MCIWorldcom/Sprint* case is a paradigmatic example of the European Commission and the US antitrust authorities working closer than ever before and sharing information constructively. See Commission Press Release "Commission opens full investigation into the *MCIWorldCom/Sprint* merger" (February 21, 2000), available at <http://www.europa.eu.int/comm>.

[103] It was alleged that the three airline owners in collaboration with their travel providers refused to supply SABRE with the same fare data which they supplied to Amadeus, in addition to denying the former the ability to carry out the various booking and ticketing functions available to the latter.

[104] US Department of Justice Press Release, "Justice Department asks European Communities to investigate possible anticompetitive conduct affecting U.S. Airlines' computer reservation systems" (April 28, 1997). See <http://www.usdoj.gov>.

[105] Commission Press Release "E.U. gives priority to U.S. Airline reservation case" (September 9, 1997), <http://www.europa.eu.int/comm>.

Commission stated, on the basis of its initial inquiry, that Air France has discriminated against SABRE to favour Amadeus.[106]

It remains to be seen, however, whether this particular case will ultimately enhance the confidence of the EC and the US regarding the effectiveness of the principle of positive comity.[107]

2. Recent developments

In June 1996, and in the wake of successful negotiations with the US authorities, the Commission adopted a proposal to build on the 1991 Agreement. The step to deepen the EC-US relations through another formal agreement was taken in 1998.[108] The new agreement has many advantages. First, it contributes to advancing the principle of positive comity. Secondly, it confirms the efforts of the parties to continue employing the principle. Thirdly, it clarifies the manner in which the principle will be implemented. Further agreements enhancing the level of co-operation between the EC and the US, as well as between the EC and other nations, are in contemplation,[109] and should be welcomed.

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[106] European Commission Press Release "Commission opens procedure against Air France for favouring Amadeus reservation system" (March 15, 1999), *Ibid.*

[107] US Legislators have made positive statements regarding these first signs of EC responses to US requests for enforcement. Senator H. Kohl of the Antitrust, Business Rights and Competition Sub-committee stated that it was becoming obvious that the US most important positive comity agreement, with the EC, was beginning to generate benefits. See <http://www.senate.gov/~kohl>.

The recent case of *MCIWorldcom/Sprint* is a very good example of co-operation between the EC and the US, involving almost daily contacts and co-ordination of information gathering, joint meetings, joint negotiations with the undertakings as well as discussions on possible remedies. See A. Schaub "Assessing international mergers: the Commission's approach", address before 10th Anniversary Conference on EC Merger Control (September 14-15, 2000), available at <http://www.europa.eu.int/comm/competition/speeches>.

[108] OJ [1998] L-173/26, [1999] 4 CMLR 502.

The agreement creates a presumption that in certain circumstances one party (so called "requesting party") will normally defer or suspend its own enforcement activities, where anti-competitive behaviour is occurring principally in and directed principally towards the other party's territory. The proposed positive comity agreement is an important development in this respect, because it represents a commitment on the part of the US to co-operate with respect to antitrust enforcement rather than seeking to apply its antitrust laws extra-territorially. See chapter 8.

[109] An agreement has also been entered into with Canada. See Co-operation Agreement between Canada and the EC OJ [1999] L-175/49, [1999] 5 CMLR 713.

(B) The EEA Agreement

The body of EC law (*acquis communautaire*) adopted into the EEA Agreement was a response instigated by the Commission to the process of globalization,[110] and the pressure the latter created for increased co-ordination in antitrust policy between different antitrust authorities.[111] The antitrust principles in the Agreement apply where there is an impact on trade between an EFTA country and the EC.[112] The agreement is similar to the EC Treaty in that it does not require signatories to adopt EC antitrust rules into the domestic legal order.

The EEA Agreement provides for consultation procedures between the parties on the antitrust rules therein.[113] These rules, according to the ECJ in its judgment in *Wood Pulp*, could in no way preclude the integral application of EC antitrust law.[114] Since this was also the view expomded by the Commission, it may well be that this explains why the Commission never thought it necessary to invoke these provisions in antitrust law cases. This view is reinforced by the "extra-territoriality" doctrine which was upheld by the ECJ in the same judgment, and which gives the Commission jurisdiction to act under the EC Treaty rules whenever an anti-competitive agreement or another anti-competitive practice, despite originating from outside the EC, is implemented within the EC.[115]

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[110] See generally T. Jakob "EEA and Eastern Europe Agreements with the European Community" (1992) *Fordham Corp. L. Inst.* 403; S. Norberg "The EEA agreement: institutional solutions for a dynamic and homogeneous EEA in the area of competition" (1992) *Fordham Corp. L. Inst.* 437.

[111] Commission 25th Annual Report on Competition Policy (1995).

[112] See Articles 53-7 of the Agreement. There are clear rules on jurisdiction in the Agreement thus avoiding the possibility of duplication of efforts on the part of both the EEA Authority and the Commission when investigating a case. See Stragier, note 95 *Ante*.

[113] However, the consultation procedures providing for the implementation of these antitrust rules in the EEA Agreement have not been put to the test, save for one state aid case. See A. Hill "Brussels backs off in state aids rows", Financial Times (August 11, 1992), at 2.

[114] Cases C-89/85 *A Ahlström OY v. Commission* [1993] 4 CMLR 407. The ECJ never had the occasion to rule on the question of direct effect of the provisions in the EEA Agreement, meaning in particular whether private parties can directly invoke them before domestic courts. See *Adams v. Staatsannaltschaft des Kantons Basel-Stadt* [1978] 3 CMLR 480, at pp 485-6 (Swiss Federal Supreme Court ruled against direct effect of Article 23 of the Free Trade Agreement between the EC and Switzerland); Case 104/89 *Hauptzollant Mainz v. C.A. Kupferberg & Cie. KG a.A* [1982] ECR 3641, at p 3665.

(C) Bilateral agreements within Europe

Several bilateral agreements with Central and Eastern European Countries have been entered into by the EC. There are two main types of such agreements: Association Agreements and Partnership and Co-operation Agreements.[116] These agreements exhibit some similarities, but they also differ in several ways. Unless otherwise stated, the term "agreements" is used in the following discussion to refer to both Association Agreements and the Partnership and Co-operation Agreement between the EC and the Russian Federation.

1. Some background

(i) Association Agreements

The general shift by the EC and Countries in Central and Eastern Europe to a new form of Association Agreements in the 1990s reflected the unprecedented and profound political and economic transitions experienced by the latter countries.[117] These Association Agreements signalled a desire on the part of these countries for closer links with the EC which seems to have been based not only on their geographic proximity, but also on shared values and increasing interdependence between them all.[118] On its part, the EC had already taken decisive steps towards the creation of a

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[115] See chapter 8 on the doctrine of extra-territoriality.

[116] Partnership and Co-operation Agreements were signed with Russia, the Ukraine, and Central-Asian Republics. See Generally, M. Maresceau & E. Montaguti "The relations between the European Union and Central and Eastern Europe: a legal appraisal" (1995) 32 *CMLRev.* 1327.

The discussion will use the Partnership and Co-operation Agreement between the EC and the Russian Federation as an example.

[117] Initially, there were three separate Association Agreements between the EC, its Member States and, in turn, Hungary (OJ [1992] L-116/1), Poland (OJ [1992] L-114/1) and Czechoslovakia (OJ [1992] L-115/1), which were signed on December 16, 1991. Similar agreements with Romania and Bulgaria, however, were initiated on November 17 and December 22, 1992 respectively. Agreements were also concluded later on with other countries bringing the number of all such agreements to a total of 10. The conclusion of all these agreements was the consequence of the conviction that free trade must go hand in hand with ensuring undistorted competition. See E. Faucompert, J. Konings & H. Vandenbussche "The integration of Central and Eastern Europe in the European Union – trade and labour market adjustment" (1999) 33 *J. W. T. L.* 121, at pp 132-4.

For an overview of these Association Agreements, see C. Lucron "Contenu et portée des accords entre la Communauté et La Hongrie, La Pologne et la Tchécoslovaquie" (1992) 35 *Revue du Marché Commun et de L'Union Européenne* 293. A more up to date account of these agreements is available at <http://www.europa.eu.int/ comm/dg04/interna/multilateral.htm>.

system based on democracy and a market-oriented economy, the rule of law and respect for human rights, so for this reason its response was positive.[119] Hence, it was important for the EC to support the political and economic changes in these countries.

(ii) The PCA between the EC and the Russian Federation

The PCA between the EC and the Russian Federation was signed on June 14, 1994. This Agreement follows from an earlier Trade and Co-operation Agreement between the EC and the USSR in 1989, which in less than two years was regarded as unsuitable for developing the relations between the parties. In entering into the PCA, Russia attempted to bring this Agreement closer to the Association Agreements. However, the EC, being concerned about the uncertainties in the transformation process in Russia and grounding its decision on geopolitical considerations, opted for a much looser framework in political, legal and economic terms. Nevertheless, from the perspective of the parties, the Agreement indicated that Russia was no longer a state-trading country but "a country with an economy in transition".[120] The Preamble to the PCA also referred to a "political conditionality" clause, declaring that the parties are "convinced of the paramount importance of the rule of law and respect for human rights".

2. The main contents

The agreements are comprehensive. They provide for almost all aspects of economic activity, political dialogue and cultural co-operation in addition to trade, commercial and economic co-operation. The main areas covered by the agreements include political dialogue between institutions, free movement of goods, workers, establishment, services, payments, capital, competition and other economic provisions, approximation of laws, economic, cultural and financial co-operation and institutions.

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[118] All these Association Agreements have been conceived with a view to substantially contributing to the countries' full integration into the EC, both in economic and political terms. Although the question whether such integration must necessarily lead to future accession to the EC is not answered, such a step seems to be aspired to by all participating countries. For a general discussion, see Jakob, at pp 429-34, note 110 *Ante*; Ramsey, note 86 *Ante*.

[119] See generally Commission 9th Report on Competition Policy (1979), at p 9. Also, T. Frazer "Competition policy after 1992: the next step" (1990) 53 *M. L. R.* 609.

[120] See generally Maresceau & Montaguti, at pp 1338-43, note 116 *Ante*.

3. The role of antitrust law in the agreements

Antitrust provisions are prominent features of the agreements. In entering into the agreements, all relevant parties concerned aimed to ensure that competition should not be distorted within the framework of the agreements. Including antitrust provisions in the agreements can be seen as contributing to a number of objectives: establishment of new rules, policies and practices as a basis for closer relations with the EC (in the case of Association Agreements, further integration into the EC). Put differently, the antitrust provisions sought to give an appropriate framework for gradual co-operation with the EC. This power to support co-operation (in the case of Association Agreements, integration) which is attributed to the antitrust provisions is not entirely surprising as it has been one of the characteristic features of EC antitrust law. On the basis of EC experience, it is therefore almost logical for the free trade provisions contained in these agreements to be supplemented by antitrust provisions, in order to prevent private trade barriers from distorting harmonious economic relations between the parties.

According to the agreements, restrictions of competition that affect trade between the parties will be assessed by the Commission or by the competent domestic authority of the relevant country, or by both, depending on the circumstances in question. The assessment is to be taken according to rules modelled on the antitrust policy chapter in the EC Treaty. To give practical effect to these general provisions, implementing rules were negotiated in order to ensure effective co-operation between the parties.[121]

4. Matters requiring specific attention

Including antitrust provisions in the agreements does not of course mean that regulating conditions of competition in cases in which the parties have an interest will be free of difficulty. Three problems may require specific attention:

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[121] In the case of Association Agreements, the rules necessary to implement the antitrust provisions were agreed to be established by the Association Councils within a period of three years. See, for example, the implementing rules for the application of the antitrust provisions applicable to undertakings provided for in Arts. 33(1)(i) & (ii) and 33(2) of the EC-Poland Interim Agreement OJ [1996] L-208/24. See M. Blässar & J. Stragier "Enlargement" (1999) 1 *EC Comp. Pol'y NewsL.* 58; T. Vardady "The emergence of competition law in (former) socialist countries" (1999) 47 *Am. J. Comp. L.* 229, at p 251; K. van Miert "Competition policy in relations to the Central and Easten European Countries-achievements and challenges" (1998) 2 *EC Comp. Pol'y NewsL.* 1; Jakob, note 110 *Ante.*

(i) Jurisdictional overlap

First of all, the legal problems concern the question of how to deal with cases falling within both – EC and the relevant country – jurisdiction. Under Article 81 EC, the EC can assert jurisdiction over anti-competitive agreements implemented in the Common Market, in accordance with the *Wood Pulp* doctrine developed by the ECJ.[122] If the *Wood Pulp* condition is satisfied in these cases, EC law would apply. However, since close links between the economies of the EC and the other parties to the agreements will be established, it is possible that certain agreements, within the meaning of Article 81 EC, between undertakings, will be implemented within the territory of both parties. In this scenario, not only can the EC assert jurisdiction, but also the other party concerned. The question would therefore be how to address problems that might arise when more than one antitrust authority become involved and possibly reach different conclusions. The Associated Countries and Russia, for example, have undertaken to adapt their own antitrust rules to the principles covered by the EC antitrust policy chapter. However, this does not eliminate all the problems of concurrent jurisdiction. For example, there will always be scope for divergence in the way antitrust provisions are enforced by different antitrust authorities.

Issues of jurisdictional overlap may arise in the context of abuse of dominance under Article 82 EC. However, they are likely to be less problematic. Abuse is likely to primarily occur in the market where the undertaking in question holds a dominant position.[123] In this instance, questions of concurrent jurisdiction might arise less frequently.

Regarding merger control, neither the PCA nor Association Agreements prejudice the exercise by the EC of its powers under the Merger Regulation, Regulation 4064/89 EC. To the extent that Russia and the Associated Countries introduce merger control regime in their domestic systems, issues of jurisdictional overlap in merger cases are likely to arise.

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[122] See chapter 8.

[123] However, note the situation can arise where dominance and abuse can fall within different markets. See *Tetra Pak* Case T-83/91 [1997] 4 ECLR 726 and *Irish Sugar* Case T-228/97 [1997] 5 CMLR 666.

(ii) No assertion of jurisdiction

Cases can be envisaged where neither the EC nor the other party concerned may assert jurisdiction. Decisions will need to be taken on the course of action to be pursued under such circumstances. In this context, an interesting question arises because an anti-competitive agreement between undertakings may not affect trade between Member States, but affects trade between the EC and the other party. Would the EC be able to deal with such an agreement on the basis of the provisions of the PCA or the Association Agreements? It is doubtful that the provisions of the agreements have direct effect.[124] First, it seems that the requirement of unconditionality is not satisfied. This is because further implementation measures must still be decided upon. Secondly, the requirement of precision also does not seem to be met. The agreements do not include an "Article 81(3) EC" type of provision which means that exemption will be provided by way of interpretation. This in itself perhaps would not necessarily render the EC unable to take action. However, for EC jurisdiction to exist in such cases, it is necessary for it to be instituted by specific executing provisions in the agreements.

(iii) Interests of parties

It is possible to conceive cases where only one party has jurisdiction but, nonetheless, important interests of the other party may be involved. In this instance, the purpose of the implementing rules should be to provide the basis for a co-operative and transparent treatment of such cases by the relevant antitrust authorities. Above all, it is essential the process should be free form complexities. Given inevitable differences between the market conditions of the parties, it can be expected that individual cases will be treated under different legal standards and so different conclusions will be reached. More significantly, a certain amount of co-ordination of action and a readiness to take into account the other parties' interests would be required. Co-operation in this instance could be modelled on the 1986 OECD Recommendation or the present co-operation agreement between the EC and the US.

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[124] See the direct effect test, as introduced by the ECJ in *Van Gend en Loos*, note 10 *Ante*. See, for example, Article 63 of the EC-Poland agreement, in which it is stated that the Association Council may be required "at a later stage to examine to what extent and under what conditions certain exemption rules may be directly applicable, taking into account the progress made in the integration process between the Community and Poland".

5. The place of secondary legislation

Another salient issue concerns both certain EC secondary legislation (such as, block exemption regulations) and its future development. The principles covered by these secondary instruments should apply when it comes to assessing an anti-competitive practice under the agreements. On the other hand, if EC legislation changes in the future, then ways and means should be found to ensure that these developments are also taken into account in interpreting such agreements.

6. EC interest

In the case of the antitrust provisions under the Association Agreements which follow Articles 81 and 82 EC, each Association Council was supposed to establish rules for the implementation of these provisions by March 1, 1995.[125] The EC was active in providing advice to the Associated Countries on implementation, which is reflected in the similarity, at least *prima facie*, between the antitrust rules of the EC and the Associated Countries.

In many respects, co-ordination in enforcement of the antitrust policies in the Associated Countries predicated on EC antitrust rules is in the latter's interest. Reliance by the EC on extra-territorial application of its antitrust rules is not guaranteed to be successful.[126] Also, EC undertakings may be served by strong enforcement of antitrust rules in the Associated Countries, especially in areas of state aid, government monopolies and abuse of dominance.

7. Approximation of laws

The agreements contain provisions on the approximation of antitrust laws.[127] A distinction can be drawn however, between the PCA and Association Agreements. In

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[125] See J. Fingleton, E. Fox, D. Neven & P. Seabright *Competition Policy and the Transformation of Central Europe* (CEPR London, 1995), ch 4 & Appendix 2.

[126] See chapter 8.

[127] See (1996) 1 *EC Comp. Pol'y NewsL.* 38. Such approximation – which includes existing and future legislation – is considered a major precondition for forging closer links with the EC. The PCA contains a clause stating that Russia will "endeavour to ensure that [its] legislation shall be gradually made compatible with that of the Community". See Article 55 PCA.

In the case of Association Agreements, approximation of laws was seen as a condition for the countries concerned to integrate into the EC. Whereas Hungary "shall act to ensure that future legislation is compatible with Community legislation as far as possible", Poland "shall use its best endeavours to

the former, approximation is limited to endeavouring to ensure that legislation is gradually harmonized with EC antitrust law. For Association Agreements, given their image as pre-accession arrangements,[128] the approximation requirement is stronger and has generated national laws broadly aligned with EC antitrust law.

The nature of the approximation requirement is open to some debate.[129] Approximation is a major precondition for closer economic links with the EC, and the countries concerned undertake to ensure all future legislation is compatible with EC antitrust law. This commitment has, in effect, imposed an obligation to simply introduce, *inter alia*, antitrust rules similar to those found in the EC without imposing an alignment obligation, which would go beyond any obligation imposed on existing Member States. In the case of Association Countries, the Commission, in its 1995 White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, has given the approximation requirement a narrow meaning by imposing a requirement on Associated Countries to comply not only with general antitrust principles, but also with the existing case law of the EC. The justification for this was in part that because EC antitrust rules do not enjoy direct effect within these countries, then a higher level of convergence is required than for existing Member States.

The EC conception of antitrust is not necessarily ideal for these small, emerging markets. In a relatively advanced economy, there are often tensions between a strict antitrust policy and accommodation of the rapid structural changes in the economy. Hence, imposing an "approximation of laws" obligation on these countries leaves very little *discretion* to their governments.[130] In comparison, developed countries have generally, first developed their policies and then modified them in the light of international agreements. Thus, the inclusion of such a commitment would mean that

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ensure that future legislation is compatible with Community legislation", and the Czech and Slovak Republic, Romania, Bulgaria, Estonia, Latvia, Lithuania and Slovenia, for their part, "shall endeavour to ensure that [their] legislation will be gradually made compatible with that of the Community".

[128] The preamble to the Poland agreement, for example, includes "recognising the fact that the final objective of Poland is to become a member of the Community and that this association, in view of the parties, will help to secure this objective".

[129] See Fingleton, Fox, Neven & Seabright, at p 55, note 125 *Ante*.

[130] F. Vissi "Challenges and questions around competition policy: the Hungarian experience" (1995) 18 *Fordham Int'l L. J.* 1230, at 1241.

the policies of these countries will be shaped from the outset by international obligations. It should be pointed out here that whilst developed countries, during times of rapid structural change, modify antitrust policy to facilitate necessary changes, this will not be possible in the case of these economies in transition due to their international obligations.

If accession to the EC is an objective, then approximation of laws at a general level is consistent, even essential, in order to realize that goal.[131] In this case, parachuting in laws on the basis of external obligations may not necessarily be objectionable. At the same time, the need for adopting antitrust law within the national legal order seems to be important in the context of the new market economies. If the aim of the countries concerned in creating closer co-operation with the EC is to develop market economies, as opposed to seeking future accession to the EC, probably the adoption of rules consistent with the cultural and institutional context of the country concerned is more desirable because they are more readily accepted by those to whom they apply, than parachuting in laws.[132] In this case, attention to effectiveness is more fundamental than approximation *per se*. The issue of effectiveness and approximation is perhaps more one of timing. The Commission may need to reappraise the importance of detailed convergence to allow for the proper development and absorption of EC antitrust law into the domestic law of such transitional economies. Domestic antitrust authorities and policy-makers in these countries on the other hand, will need to work out a careful compromise between the current needs of their economies and the aim of closer links with the EC.

At a more general level, the inclusion of such an approximation commitment in the agreements can be seen as part of the regulatory competition between the US and the EC for influencing the post-Soviet states of Europe.[133] Approximation makes it easier for EC undertakings to operate in these countries and will also facilitate fuller co-operation with the EC and, in the case of Association Agreements, further integration

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[131] Such approximation of laws is a sensible step because these countries will be able to ensure effective competition by their own means. It is also desirable from the point of view of economic undertakings because this will relieve them from having to deal with totally different systems of antitrust. This has both substantive law and procedural benefits.

[132] See chapters 10 and 11.

[133] See McGowan & Wilks, at p 144, note 5 *Ante*.

with a view to ultimate membership. Nonetheless, it seems that relations with the EC are very much driven by the internal agenda of the EC rather than the needs of these countries to develop.[134] As a result, one may conclude that the postponement of fuller co-operation between Russia and the EC and accession to the EC in respect of Association Agreements is premised not on the inability of the EC to consume goods produced in the East but on the inability of domestic undertakings of the countries concerned to withstand competition from EC undertakings. Thus, the approximation requirement may not be solely in the interests of the countries concerned, but also serves the interests of EC undertakings in general and, those of the EC in particular.[135] Furthermore, the inclusion of this requirement in different forms reflects not only the different stage of development for the economies of the countries concerned, but also the lack of balance in the bargaining positions of the parties.

8. Recent developments

On September 25-26, 2000, the Commission and 12 Candidate Countries held their 6th Annual Conference.[136] The focus of the event was on the importance of full and efficient enforcement of antitrust law. At the conference, the Commission emphasized that establishing effective systems of antitrust in the countries concerned is of central significance to the ongoing accession negotiations. For the Candidate Countries, negotiations on the EC antitrust policy chapter have been opened and full efficient enforcement of antitrust rules is of key importance in these negotiations.

The Conference was a policy-oriented event, focused in particular on the development of EC antitrust law and on how to ensure the full and proper enforcement of its rules

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[134] See Kennedy & Webb, at p 1095, note 96 *Ante*.

Approximation is required even though EC antitrust law itself is not always the best model. The EC is driven by an integration agenda and yet insists on dealing with these countries one-by-one, rather than collectively, even though arguments in favour of approximation are centred around globalization and the need for shared responses by domestic antitrust authorities across national boundaries. The Association Agreements for example emphasize the existence of conditions, which have to be met before membership will be considered.

[135] Ramsey, note 86 *Ante*. A more informative and specific account can be found in P. Muchlinski "A case of Czech beer: Competition and competitiveness in the transitional economies" (1996) *M. L. R.* 658.

[136] These Countries are Bulgaria, Cyprus, Czeck Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovak Republic and Slovania. Useful summaries of the various workshops of the conference are available at <http://www.europa.eu.int/comm/competition>.

in Candidate Countries. It demonstrated the necessity of a timely application of EC antitrust law for a successful accession, and has re-confirmed the commitment of the Commission and Candidate Countries to enhancing co-operation in the filed of antitrust law.

(D) Toward a wider framework of antitrust policy

The Commission's efforts towards creating a wider framework of antitrust policy beyond the EC and Europe have been quite substantial.[137] These efforts have been the result of several factors, including those relating to increased globalization and technical changes and future accession to the EC, as well as the need build a global order within antitrust policy. These efforts are not examined at present since they are reviewed in chapters 9 and 10.

(E) The value of EC antitrust law

A final important comment to be made in this part relates to the value of EC antitrust law beyond the single market. EC antitrust law is a useful tool for nations that aim to introduce or develop a framework for competition in general and, for antitrust law in particular. It has been written:

> "European competition law experience is also, however, a valuable source of knowledge and guidance for policy-makers in states that are today trying to develop market economies and forge appropriate legal frameworks for them. Most such countries have competition law systems, but they generally play marginal roles, at least in part because there is little

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[137] Various groups in the EC have attempted to tackle this issue. In 1994 the "Wise Men Group", a group of experts commissioned by K. van Miert made some interesting proposals in order to strengthen the multilateral framework of antitrust rules and to promote international co-operation in this area. The Group has recommended strengthening plurilateral co-operation in response to global competition. It recommended to create a fully-fledged international instrument, including adequate enforcement structure, a core of common principles and a positive comity provision. The Group also put forward a proposal for a dispute settlement mechanism that could be used to settle disputes between member countries regarding their compliance with regard upon rules and principles of the instrument. See "Competition policy in the new trade order: strengthening international co-operation and rules" COM (95) 359, available at <http://www.europa.eu.int>.

The Commission has been particularly active in discussions within the WTO, the OECD and the United Nations Conference on Trade and Development (UNCTAD), adopting a code on restrictive business practices. The Commission has been a strong supporter of the Code, and it seems to endorse most of its views. An interesting feature of the Code relates to its terminology, which seems to be closely related to that of EC antitrust law, such as the concepts of "dominance" and "abuse". This, along with the fact the Code emphasizes the importance of institutional dimensions, and the interaction between these and substantive provisions, as the case with EC system of antitrust, makes it clear that EC antitrust law has played a central role in the development of this Code. See Commission 25th Report on Competition Policy (1995), section V; Commission 28th Report on Competition Policy (1998). A detailed examination of the WTO, the OECD and UNCTAD can be found in chapter 10.

> understanding of the dynamics, costs and consequences of such systems. Policy-makers often face situations that are similar to those faced by Europeans in the recent past, and thus European experience may aid them in identifying and perhaps achieving competition law systems."[138]

The fact that the EC system of antitrust has been successful, is a factor that will influence the decision of policy-makers in third countries to use it for insights and guidance when they consider adopting antitrust laws or changing their existing ones. The number of countries that have adopted antitrust laws on the basis of those of the EC has increased over the years.[139] As was seen above, some of these countries are already moving toward future accession to the EC, but others bear no relation to the EC, whether in geographical or other terms.[140] Such a development highlights an important role for EC antitrust law, and its growing success and importance presents an opportunity that the Commission has been keen to exploit in several ways.

However, this is also a challenge for the Commission. Certain countries may not be willing to consult EC antitrust experience for insights and lessons. The US, for example, has been a forerunner in this respect because the common sentiment on the other side of the Atlantic has always been that such experience has little to offer to a system of antitrust which celebrated its Centenary over a decade ago.[141] To a certain extent, this reaction is understandable because the US has an extremely well-established tradition of antitrust law and policy.[142] However, as will be seen, this reaction has some serious implications for the internationalization of antitrust policy.[143] The fact that the US system of antitrust is strong, and that US policy-makers are mostly unwilling to consider the EC system of antitrust for guidance on how antitrust policy may be internationalized means that the Commission will find it hard

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[138] Gerber, at p 5, note 2 *Ante*.

[139] See pp 248-50 *Post*.

[140] See Commission 28th Report on Competition Policy (1998). See also chapter 10.

[141] Gerber has argued that policy-makers in the US should find much of value in looking toward EC system of antitrust for lessons and insights. However, he notes in this regard that while "many European scholars, judges, and administrators have paid close attention to US antitrust law experience, their US counterparts generally have assumed that they have little to learn from European experience. As a result there have been few efforts by American scholars to analyze this experience and its potential relevance for the US". Gerber, at p 6, note 2 *Ante*.

[142] See ABA, at p 26, note 16 *Ante*.

[143] See pp 248-50 *Post*.

to advocate the development of an international system of antitrust on the basis of the principles and ideas developed in the EC system over the years.[144] It is doubtful whether the US, and several other countries,[145] will regard the EC system of antitrust – which provides a model of internationalization of antitrust policy – as a useful example for how to develop a comprehensive international system of antitrust. This can be seen from the number of occasions over the years on which the US rejected proposals put forward by the EC for such a system.[146] This situation has led to a conflict of views between the US and the EC which seem to constitute a hurdle in the face of the internationalization of antitrust policy.[147]

V. IMPLICATIONS OF THE ANALYSIS

In spite of the state of stagnation and the divisive conflicts which the EC has suffered at certain stages of its existence,[148] its system of antitrust seems to have been largely successful. The political significance and influence of the system has been as extensive as its economic and legal impact. The success of the system can be looked at from the following angles:

(A) The relationship between EC and domestic antitrust laws

The convergence of domestic antitrust laws seems to carry various implications for the separation between EC and domestic levels. In marking a new departure for the traditional EC/Member State relationship, this convergence has furnished an important example of how EC membership and this "new legal order of international law" affected the national legal order. This impact can be seen in light of the fact that convergence has even been considered by Member States which, on more than one

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[144] The EC is in favour of this proposal.

[145] An example is Norway which has been reluctant to model its antitrust law on that of the EC. See chapter 10.

[146] See D. Gerber "The U.S. – European conflict over the globalisation of antitrust law" (1999) 34 *New Eng. L. R.* 123, at p 130. Also, pp 248-50 *Post.*

One can also add that the US does not believe that international antitrust policy should usurp its own. Furthermore the US seems to be sceptical over how far the EC focuses on competitive impact as opposed to non-economic factors. See further chapter 10.

[147] *Ibid.*

[148] See generally Craig & De Burca, at pp 13-4, note 30 *Ante.*

occasion, seemed unwilling to shift from their well-established systems of antitrust to the EC model.[149]

Convergence is not necessarily free from difficulties. Even with the existence of a comprehensive textual and procedural harmonization, there can still be scope for divergence between the EC and Member States on the one hand and among the Member States themselves on the other, insofar as policies underlying EC and domestic antitrust laws may differ.[150] It is true that such disparity may not present a difficulty if there is sufficient flexibility at the national level to accommodate the grounding of EC antitrust law within domestic legal orders and if the antitrust laws – EC and domestic – reflect general underlying principles. Still, divergence may prove problematic where the direct consequence of convergence leads to obfuscation in the relationship between EC and domestic antitrust laws, with the important differences between the two not being considered.

Convergence may increase interest at the domestic level in developments at EC level, which may promote more two-way traffic between them. Moreover, it can be seen as a vote of confidence in the EC system of antitrust. At the same time, responsiveness to domestic legal culture in different Member States will inevitably lead to nationally specific antitrust laws,[151] albeit ones with a common genesis (as a result of convergence).[152] Furthermore, convergence may eventually allow for a better division

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[149] A good example is Germany. There have been some calls to bring German law more in line with the EC rules on cartel. See P. Norman "Bonn plans cartel law change" Financial Times (April 28, 1997); S. Held "German antitrust law and policy" (1992) *Fordham Corp. L. I.* 311; R. Bechtold "Antitrust law in the European Community and Germany – an uncoordinated co-existence?" (1992) *Fordham Corp. L. Inst.* 343.

[150] See B. Bishop & S. Bishop "Reforming competition policy: Bundeskartellamt – model or muddle" (1996) 17 *ECLR* 207.

Given that EC antitrust law is shaped by policies underlying it, convergence of domestic antitrust laws within the EC depends not only on formal adoption of text and procedure of EC antitrust law at domestic level, but ultimately on the convergence of those policies. See Maher, note 16 *Ante*.

[151] The importance of culture has already been spelt out in chapters 3 and 4. See generally L. Haucher & M. Moran *Capitalism, Culture and Economic Regulation* (Oxford, 1989), at p 3.

[152] Convergence of domestic antitrust laws has not meant that domestic antitrust laws have become non-existent. It has been shaped and influenced by the domestic systems which created these laws. In this sense, convergence embodies a balance or compromise between EC antitrust norms on which domestic antitrust laws have been based and the domestic need to ground these concepts and ideas within the legal orders of the Member States. See J. Jacquemin "The international dimension of European Competition policy" (1993) 31 *J. C. M. S.* 91.

of competence between EC and national spheres, but in the short term, the problems associated with overlapping jurisdiction and the ensuing legal uncertainties are likely to remain.

An additional comment should be made on the co-ordinating role of the Commission in relation to decentralized enforcement of EC antitrust law. Through this capacity, the Commission will be passively overseeing the way domestic antitrust laws develop. To ensure effective co-ordination, the Commission will need to facilitate informal contacts between domestic antitrust authorities, which will surely increase the importance of EC antitrust law. If this happens, the latter's influence on domestic antitrust laws may lead to increased interest at the national level in the way the former develops.

The voluntary adoption of EC antitrust law norms in the legal systems of Member States can be contrasted with the experience of Central and Eastern European Countries, where approximation of laws has been a priority for the Commission. Of course, convergence within the EC cannot be equated with the approximation of laws elsewhere in Europe. It is this angle to which the discussion now turns.

(B) The EC and its agreements with neighbouring countries

Some emphasis was placed above on the Commission's initiatives on a wider level in Europe. These efforts have led to the conclusion of different types of agreements between the Commission and its neighbouring countries. Clearly, the importance of the EC system of antitrust has increased in light of these efforts. As the Commission has linked some of these agreements (Association Agreements) to the objective of future accession to the EC,[153] it has placed itself, and the EC, in a superior bargaining position. Including an approximation of law requirement in those agreements has meant that EC antitrust law is becoming increasingly transposed into different legal systems and traditions. Arguably, this should be seen as one of the main successes of EC antitrust law experience. Accommodating EC-like antitrust law in Central and Eastern European Countries seems to indicate that EC antitrust law continues to be of importance in achieving further integration. Thus, the EC is likely to expand in

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[153] See A. Fiebig "A role for the WTO in international merger control" (2000) 20 *Nw. J. Int'l L. & Bus.* 233, at p 237; See the Commission's document on "The enlargement negotiations after Helsinki" MEMO/00/6 (February 6, 2000).

geographic terms, whilst at the same time maintaining its rules and principles on which it was originally based and which have contributed to its development over the last forty years or so. This seems to have equipped the Commission with the confidence and experience to advocate EC antitrust thinking beyond all EC and European boundaries.

(C) EC antitrust law on the international plane

It was said above that the EC has been particularly keen to demonstrate its antitrust lessons at a higher level, mainly through participating in multilateral discussions and contributing to the work of international organizations dealing with antitrust policy. However, the EC's success in this instance cannot be equated with that in the context of its relationship with its Member States, nor with that of its efforts at a wider European level.

As far as the international plane is concerned, the EC has been presented with a "double-edged sword": an opportunity and a challenge regarding its antitrust thinking. At one end of the spectrum, this is an opportunity for the EC to inform the world on how to set up and operate a strong and successful new type of "international system of antitrust".[154] With its successes at both EC and European levels, the EC seems to be justified in advocating its views on a blueprint for international system of antitrust. At the other end of the spectrum, it is a challenge because the EC is competing with other nations that have a strong antitrust tradition. A leading example is the US, which is keen neither on surrendering to international antitrust interventions by international organizations, nor enthusiastic about receiving antitrust lessons from this side of the Atlantic.

(D) The Commission as a supranational institution

Pushing the discussion to its extremes, it is clear that the Commission – as a supranational institution – has contributed immensely to the success of the EC system of antitrust and its growing influence. In fact, the position of the Commission is rather special. The Commission is an EC institution and in becoming a leading player in the EC system of antitrust, it has confirmed its commitment to shaping this newly created legal order. Yet, the Commission is also an international institution, or a supranational

one to say the least. This is not only confirmed by the fact that the EC is "a new legal order of international law", but more importantly, by how the Commission has developed the EC system of antitrust, both within and outside the boundaries of the EC.[155] In this way, the Commission has evolved into an institution with an international antitrust thinking.

Since an early stage in the EC, the Commission paid close attention to the relationship between EC and domestic antitrust law. The original goal of the Commission within EC antitrust policy was to strengthen the role of the EC system of antitrust as a whole. Through committing itself to enhancing the system, the Commission has successfully expanded the importance and influence of the system. This success has depended to a large extent on the support the Commission has received from other key EC institutions, such as the Courts, the Council and Parliament,[156] and from important domestic forces, such as the sectors of national industry.

The future success of the Commission, especially as far as its international antitrust thinking is concerned, will definitely continue to depend on these players. Still its success will also depend on the power of the Member States, which will arise from factors such as the extent to which they seek to co-operate with one another; the extent to which domestic politicians and policy-makers consider antitrust policy is important; and the extent to which officials of domestic antitrust authorities believe that can combat anti-competitive practices as satisfactorily as the directorate-general of competition in Brussels.

VI. CONCLUSION

Looking at the developments of the EC system of antitrust over the last fifty years, it is clear that it has been successful and its success has immensely contributed towards its current, advanced state. Those developments have been gradual, but also largely unpredictable. The EC antitrust law experience is of significance not only for

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[154] See Commission 28th Report on Competition Policy (1998).

[155] Some writers have strongly argued in favour of expanding the international reach of EC antitrust law by the Commission. See J. Friedberg "The convergence of law in an era of political integration: the *Wood Pulp* & *Alcoa* effects doctrine (1991) *U. Pitt. L. Rev.* 289, at p 322-3.

[156] See Parliament resolution on the Commission's 28th Report on Competition Policy (1998), Commission Report: SEC (1999) 743; Bull. 5-1999, at point 1.2.48.

countries seeking to develop systems for competition and antitrust law, but also for those in favour of establishing an international system of antitrust.

The degree to which this experience is seen as valuable for these purposes depends on extrinsic as well as intrinsic factors. The former include the willingness of policy makers in other countries to utilize EC antitrust experience for inspiration. Conversely, intrinsic factors, on the other hand, include how the EC system of antitrust will develop in the light of new acts of accession to the EC and the relationship between the EC and national levels. How these factors will evolve and what kind of forces they will bring with them will undoubtedly shape the Community of today and tomorrow and will impact on the process of internationalization of antitrust policy.

Chapter Seven

SOVEREIGNTY

This chapter examines the doctrine of state sovereignty and its significance for the internationalization of antitrust policy. There is an abundance of literature discussing the doctrine in general and its considerations. However, there is very little said about sovereignty and antitrust policy,[1] and even less on the relationship between sovereignty and the internationalization of antitrust policy.

The chapter is structured as follows. Part I examines the conceptual framework of sovereignty. It considers issues such as the legal, social and political roles of sovereignty. Part II considers the place of sovereignty under public international law generally. It analyzes questions such as relinquishment and acquisition of sovereignty which are of importance in the internationalization of antitrust policy. Parts III and IV deal with the relationship between sovereignty and the internationalization of antitrust policy and the emerging order in that relationship respectively. Finally, part V offers a conclusion.

I. THE CONCEPTUAL FRAMEWORK OF SOVEREIGNTY

(A) Rethinking sovereignty

Brierly has explained that under public international law a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by public international law, jurisdiction over persons and things

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[1] See N. Averitt & R. Lande "Consumer sovereignty: a united theory of antitrust and consumer protection law" (1997) 65 *Antitrust L. J.* 713; S. Farmer "Altering the balance between sovereignty and competition: the impact of *Seminole Tribe* on the antitrust state action immunity doctrine" (1997) 23 *Ohio Northern U. L. Rev.* 1403; S. Farmer "Balancing state sovereignty and competition: an analysis of the impact of *Seminole Tribe* (*Seminole Tribe v. Florida*, 116 S. Ct. 114 (1996) on the antitrust state action immunity doctrine" (1997) 42 *Villanova L. Rev.* 111; J. Griffin "When sovereignties may collide in the antitrust area" (1994) 20 *Canada-United States L. J.* 91; S. Snell "Controlling restrictive business practices in global markets: reflections on the concepts of sovereignty, fairness and comity" (1997) 33 *Stan. J. Int'l L.* 215.

to the exclusion of the jurisdiction of other states, and that when a state exercises such authority it is said to be 'sovereign' over the territory.[2]

It is beyond the scope of this chapter to provide an exhaustive examination of the origin and historical perspective of sovereignty, rather its aim is to examine whether sovereignty plays any role in the world today and if so, how this affects the internationalization of antitrust policy.

Over the years, sovereignty permeated the understanding of national and international relations. It grew in parallel to the evolution of the modern state,[3] and it seems to reflect the evolving relationship between the state and civil society and, to a certain extent, between political authority and the business community.[4] However, sovereignty is not a fact, but rather a concept or a claim concerning the way political power is, or should be, exercised.[5]

Sovereignty has acquired many connotations over the centuries, which have given rise to the confusion surrounding it, in particular its association with national interest, national independence and national security. Other factors have also contributed to this confusion, such as the identification of sovereignty with the ability of states to impose their will in certain cases, whether on their citizens, foreign nationals or other states[6] – a point that this and the next chapter shall explain, raises important questions under public international law in general and, the internationalization of antitrust

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[2] J. Brierly *The Law of Nations* (Oxford, 1963), at p 162. See also Higgins "The legal basis of jurisdiction" in C. Olmstead (ed.) *International Law Association, Extraterritorial Application of Laws and Responses Thereto* (Oxford, 1984), at p 5.

[3] J. Anderson (ed.) *The Rise of the Modern State* (Brighton: Wheatsheaf Books, 1986).

[4] R. Ashley "Untying the sovereign state: a double reading of the anarchy problematique" (1988) 17 *J. Int'l Stud.* 231; R. Walker "Sovereignty, identity, community, reflections on the horizons of contemporary political practice" in R. Walker & S Mendlovitz (eds.) *Contending Sovereignties: Redefining Political Community* (Boulder, Co.: Lynne Rienner, 1990); F. Halliday "State and society in international relations: a second agenda" (1987) 16 *J. Int'l Stud.* 218; P. Muchlinski *Multinational Enterprises and the Law* (Blackwell, 1995).

[5] F. Hinsley *Sovereignty* (London: C.A. Watts, 1966), at p 1.

[6] It has been argued that sovereignty should be seen in both positive and negative terms. In positive terms it may be described as the oneness of the legal system within the territory of a state, i.e. that the jurisdiction over the territory is in the hands of one authority which is supreme. In negative terms sovereignty means a system of law and administration of justice which is free from outside interference. See D. Lasok & J. Bridge *An Introduction to the Law and Institutions of the European Communities* (Butterworths, 1982), at p 262.

policy, in particular. In light of this, in addition to the far-reaching transformation of the landscape of antitrust policy witnessed during the last century, especially in recent decades, the existence of such confusion creates a need to rethink the concept and practice of sovereignty.

(B) Types of sovereignty

There are two types of sovereignty. On the one hand there is "operational sovereignty" – the power needed to exert supreme legitimate authority. On the other hand, there is "state sovereignty", which remains the organizing principle of international relations. This chapter is concerned with state sovereignty.

(C) The significance of sovereignty

The significance of sovereignty raises difficult questions about its relevance to the internationalization of antitrust policy. At one end of the spectrum – especially with the emergence of new states – and for the purposes of the present study the emergence of new systems of antitrust – sovereignty seems to be an ever more important factor in the contemporary world. At the other end of the spectrum, lies the view that with the economic and cultural integration fuelled by the process of globalization, sovereignty seems to be a less significant factor. An accelerated process of globalization raises new questions about the practice of state sovereignty.[7]

(D) The roles of sovereignty

The roles of sovereignty on the other hand concern its social, political and legal values. As far as the first two are concerned, it has become arguable that sovereignty serves both as a shield protecting national interests against foreign interference and influences and as a means for combating restraints on individual freedom by economic power and wealthy individuals. Yet, the position is less clear as far as the legal role of sovereignty is concerned. To establish whether sovereignty has a legal role to play or whether it simply exists in the crossroads between law and politics, the content of sovereignty has to be identified. This is an issue which is dealt with below.

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[7] J. Rapsenau "Muddling, meddling and modelling: alternative approaches to the study of world politics in an era of rapid change" (1979) 8 *J. Int'l Stud.* 130.

In a way, the above discussion shows that there seems to be a paradox surrounding the concept of sovereignty, which has only recently emerged. In the 1970s, sovereignty was seriously questioned when both political scientists and international lawyers mounted strong challenge from the cornerstone of their disciplines. This is evident from the writings of scholars, such as Camilleri and Falk who have widely argued that during that period sovereignty was residual.[8] In spite of this, however, the concept of sovereignty remains a vital issue in the world order.

The conclusion to be drawn from this is that the concept may be seen to have been under revision but not yet extinct. Sovereignty is believed to carry an increasingly persuasive force. Indeed, "Claims to sovereignty are more widely and sometimes more vigorously asserted than ever before. The concept has, moreover, tended to become a bulwark behind which groups in the world community . . . are apt to retrench themselves, and, within such groups, a protection of national freedom against super-power control or domination by extremist influences . . . the catchword of sovereignty continues to intoxicate national policies".[9]

(E) Measuring the content of sovereignty

It is doubtful whether many concepts under public international law have been more vehemently debated in legal doctrine than that of sovereignty.[10] In addition, hardly any other concept has been so elastic, so much subject to modifications and consequently so confusing as that of sovereignty. The manifestations of the concept have been numerous. For different writers, sovereignty varies not only according to its alleged content, its legal implications and the prerequisites upon which it may be founded, but also the subject or object of which it is supposed to be an attribute. Diversity has also been a fundamental connotation of sovereignty. All these variations run so closely parallel to the political changes of time that it becomes almost impossible to determine whether the variation is a product of the political change, or

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[8] J. Camilleri & J. Falk *The End of Sovereignty?: The Politics of Shrinking and Fragmenting World* (Aldershot, Hants, 1992).

[9] C. Jenks *A New World of Law: A study of the Creative Imagination in International Law* (Harlow: Longmans, 1969), at p 131; W. Friedmann *The Changing Structure of International Law* (Columbia University Press, 1964), at p 35.

[10] M. Korowicz "Some present aspects of sovereignty in international law" (1961) 102 *R. D. C.* 1, at p 5.

vice versa. For these reasons, measuring the content of sovereignty does not seem to be particularly easy.

(F) Some comments

Whichever of the functions described above is attached to the concept of sovereignty, one cannot derive, extract or deduce substantive rules or principles, whether general or specific, from the concept. Prominent scholars such as Kelsen repeatedly emphasized the triviality of this.[11] One can thus conclude that it is an illusion to believe that legal rules can be derived from the concept of sovereignty. It is entirely unjustified to derive any rights for sovereign states from the concept of sovereignty. One cannot draw any conclusions from this concept, other than that a sovereign state is a subject of public international law, upon which rights are conferred and obligations imposed. As the discussion below shows, this constitutes a central aspect of the significance of sovereignty within the internationalization of antitrust policy.

Sovereignty and the framework of ideas, which surround it are a dominant feature of contemporary political debate, analysis and policy. There seems to be a sovereignty discourse – a way of thinking about the world in which nation states are the principal actors, the repositories of power and the principal objects of interest. Debate about national policies, national competition, national culture and national actors and objectives are a constitutive part of this discourse. Measures that support the state, reinforce the sense of national community, advance the national interest, and represent actions in which this discourse plays a key explanatory role.

II. SOVEREIGNTY UNDER PUBLIC INTERNATIONAL LAW

Before addressing the significance of sovereignty in the internationalization of antitrust policy, it is essential to examine the scope of the doctrine under public international law generally. In particular, the present part of the chapter looks at the question of the acquisition and relinquishment of sovereignty since this is an issue of central concern for the purposes of the present thesis.

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[11] See generally H. Kelsen *Principles of International Law* (Holt, Rinehart & Winton, c1996).

(A) Who enjoys sovereignty under public international law?

Public International lawyers would agree that sovereignty is attributed to states in the world community. That much seems clear. States are considered to be sovereign according to a formula embedded in public international law.[12] Since only states can be sovereign, other subjects of public international law, such as international organizations and legal and natural persons would thus be subordinate. Looking at that formula would reveal the reasons for this.

(B) Acquisition and relinquishment of sovereignty

In order to know when sovereignty is relinquished or acquired, the relevant formula under public international law must be consulted. The position here is as follows: the assumption is generally made that sovereignty concerns the ability (competence, authority) of a state to impose duties and confer rights, and that a state must retain a certain minimum of this power in order to be sovereign. This is the way in which sovereignty is acquired or retained. An issue that is of more importance for the purposes of the present chapter relates to the query of what does it take for states to relinquish their sovereignty. To illustrate, reference is made to the case of the EC.

Member States of the EC have committed themselves to a legal order of unlimited duration.[13] The different treaties on which the EC, and later the EU, rest clearly have not led to a loss of the sovereignty of Member States, but a limitation, albeit in certain fields, thereof.[14] An interesting question in this regard relates to what would be needed for Member States to relinquish their sovereignty and consequently for the EC as such to become a sovereign (federal) state. Surely, this would not happen with the abolition of the veto power of Member States in one sector. The position is less clear however, once the veto power is abolished in several sectors, in all sectors or even with the establishment of a central government in the EC. Somewhere along this

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[12] Article I of the Montevideo Convention on Rights and Duties of States provides that: "The state as a person of international law should possess the following qualifications (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states".

[13] See Article 312 EC.

[14] See chapter 6, note 10.

Arguably, this can be seen as a loss of sovereignty. However, one could say that Member States have not lost their sovereignty completely; but fetters in some cases, since they can always leave the EU, even if impossible politically.

continuum, the point must be reached where Member States are no longer sovereign under public international law. In spite of this, one point is very obvious: through creating a supranational system of antitrust as part of a wider legal order, Member States do not seem to have relinquished their sovereignty. This point has obvious implications for the internationalization of antitrust policy because, it may be possible to argue that creating an international system of antitrust cannot reasonably be expected to involve a relinquishment of national sovereignty. A limitation thereupon, however, can be legitimately expected.

(C) Sovereignty is relative not absolute

The general consensus under public international law is that sovereignty is not absolute. States do not enjoy 'unqualified sovereignty'. This means that as long as more than one state exist in the international family, states can not have absolute freedom of action individually. The understanding is that absolute sovereignty would conflict with the principles of public international law – a law binding on all states – and would afford states the opportunity to ignore the binding force of those principles. Thus, from the perspective of these principles, the sovereignty attributed to states cannot be of an absolute character – for otherwise there would be a contradiction in terms. In legal terms, the more acceptable view is that sovereignty must be relative: Public international law imposes restrictions on states; and their rights or freedom are relative to those restrictions.[15]

Relative sovereignty acknowledges the fact that states are included in a "web of relationships" which necessarily imposes certain limitations upon their will.[16] These limitations vary of course from time to time, all according to the development – whether in an expanding or retracting direction – of public international law. In this way, it is said that one of the characteristics of sovereign states as subjects of public international law is that they are immediately subordinated to public international law

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[15] See H. Kelsen "The principles of sovereign equality of states as a basis for international organization" (1944) 53 *Yale L. J.* 207, at p 208. See also Kelsen, at p 441, note 11 *Ante*.

[16] C. de Visscher *Théorie Et Réalité En Droit International Public* (Paris, 1953).

and, consequently, that there is no other intermediate supranational law governing the state.[17]

Thus, in order to determine whether a state is sovereign under public international law, and therefore subject to it, one must discover the character of the law immediately governing the state, i.e. whether the law is international or otherwise in nature. Here it would be meaningless to apply the definition of public international law, as a law binding on sovereign states. This can be illustrated with reference to the distinction between the EC and the US.

In the EC, Member States are considered to be immediately subordinated to public international law, whilst in the US states are considered to be immediately subordinate to municipal law. If a treaty concluded between sovereign states is based on the understanding that one or several of its participants shall surrender some of the qualities which under public international law are considered essential for sovereignty, then the treaty, at least in that respect, is no longer public international law. The several states of the US federal system lost their sovereignty in the public international law sense, the Member States of the EC have not.

(D) Vertical relationship

Regarding the relation between public international law and national law, as opposed to the inter-state relation, there is no minimum competence required of the states in order to be sovereign. In this way, the notion of sovereignty would serve no purpose. As was seen earlier in the present chapter, public international law can restrict the freedom of states to any extent without reaching a point where the bounds of sovereignty are split. Such a point does not exist. International law may restrict the freedom of states, it may limit their competence (power) until there remain only minor administrative functions for the state to fulfil and may go even further. Public international law may even imply the abolition of multiple statehood altogether and the creation of a new world state. Obviously, in this case – with the absence of individual sovereign states – sovereignty is relinquished.

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[17] Obviously, the position here is arguable, especially in the case of the EC. Member States of the EC, though subject to international law, are bound by the Treaties establishing the EC. The argument can still be made however, that Member States are still subject to international law, in spite of the existence of the EC. See pp 125-6 *Ante*.

Thus, sovereignty may be relinquished to another state, or group of states or all other states, but not to the sphere of public international law. Relinquishment of sovereignty is a horizontal, not vertical, phenomenon. This is not to suggest that international agreements always confer rights and impose duties upon states co-extensively, or that it is compatible with public international law that a state surrenders its sovereignty by concluding an agreement with other states, or that customary law, especially if particular in character, cannot have like effects. It is merely suggested that the international law system – in this case an international system of antitrust – may expand its jurisdiction at the expense of the national law systems – in this case domestic systems of antitrust – without infringing the sovereignty of states, and that this issue lies entirely within the realm of the public international law-national law relationship. In other words, all states cannot lose their sovereignty, unless a new world state is established as a consequence of which the multitude of states become extinct!

(E) Substance of Sovereignty

This seemingly obvious conclusion has one further implication. Under public international law, the formula on sovereignty cannot be substance-oriented. The fact that substance cannot constitute the criteria for sovereignty is based on the following points. First, there is the proposition that an international system may encroach upon national systems without infringing the sovereignty of states. Public international law may – by regulating and restricting the freedoms of states – reduce to any extent the domestic sphere, and thus there would be no field that cannot be regulated by public international law. Secondly, there is the fact that public international law is a flexible legal system in a process of continuous development.

It follows therefore that the substance of sovereignty, if there is such a thing, varies with the development of public international law. The substance of sovereignty can not be static as, in order to establish any kind of substance of sovereignty one must first analyze the principles of public international law in general. It is the total effect of public international law upon the domestic sphere that determines the boundaries of sovereignty. Sovereignty under public international law as a whole is in a constant state of change and evolution. The substance of sovereignty is viable; and cannot be

regarded as fixed and definite. It is important to both acknowledge and recognize this conclusion.

Thus, the concept of sovereignty is intimately linked to matters falling within the domestic domain and unregulated by public international law. The formula on sovereignty seems to relate to the possibility of a state independently governing matters in the domestic domain. Or somewhat more concretely: in order to be subject to public international law, a state must be able to independently govern – without the legal authority of another state – those matters which fall within the domestic sphere (and not the international law sphere), that is, it must be sovereign. The scope of the domestic domain can be determined only on the basis of the relation between public international law and national law at a particular moment, and hardly with any precision. For instance, one could say that a state lacks sovereignty on the grounds of that relationship at a particular moment. Since – and this is vital – the substance of sovereignty is viable, there cannot be an international law formula on sovereignty that is substance-oriented i.e. a formula which prescribes that, in order for a state to be sovereign, it must be able independently to govern certain matters. All that such formula may predict is that sovereignty has to do with substance within the domestic domain.

III. SOVEREIGNTY AND THE INTERNATIONALIZATION OF ANTITRUST POLICY

(A) Searching for an appropriate nexus

The concept of sovereignty has implications for the creation, operation and enforcement of domestic systems of antitrust. To an extent, the truth behind this statement is not hard to deduce. The idea of protecting competition itself is, in many ways, closely linked to elements of national interest and policy considerations which themselves are attached to sovereignty. Further, implications can be identified through considering the different dimensions of sovereignty.

(B) The two dimensions of sovereignty

Sovereignty is a bi-dimensional concept, and a full account must be taken of each relevant dimension in order to facilitate an understanding of its relevance to the internationalization of antitrust policy.

1. The first dimension: sovereignty from a national perspective

From a national perspective, sovereignty is relevant to the subject-matter of the present thesis for two reasons. The first concerns the view held by certain states that a form of internationalization of antitrust policy – through which autonomous international institutions will be created – amounts to a clear interference with their national sovereignty. One does not need to go further than the position of the US to deduce the accuracy behind this statement.[18] The second reason is related to the fact that extra-territorial application of the domestic antitrust laws of one state – an issue examined in the following chapter – may be deemed to encroach upon national sovereignty by other states.[19] The implications of these reasons prompt a particular need to examine the doctrine of sovereignty and its place from a national perspective under the internationalization of antitrust policy.

2. The second dimension: sovereignty from an international perspective

Having outlined the national dimension of sovereignty, the international dimension is examined next. State sovereignty faces certain limitations under the creation of an international system of antitrust. It is legitimate to suggest that a form of internationalization of antitrust policy – as a result of which autonomous international institutions are established – presupposes some kind of limitation on the sovereignty of individual states. Support for this suggestion can be sought from the previous chapter where it was demonstrated how the EC provides a good example of

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[18] See J. Griffin "What business people want from a world antitrust code" (1999) 34 *New Eng. L. Rev.* 39, at p 45.

[19] The most frequent argument in the diplomatic protests lodged against reliance by states – especially by the US – on the doctrine of extra-territoriality in antitrust policy has been that the extension of enforcement jurisdiction by states over foreign undertakings in antitrust policy matters transcending national boundaries infringes the sovereignty of other states. See claims by the Swiss Government on the application of US antitrust provisions in proceedings against the Swiss Watchmaking industry, where it argued that such an application would "infringe Swiss sovereignty, would violate international law and would be harmful to the international relations of the US". See *United States v. Watchmaking of Switzerland Information Centre, Inc.* 133 F. Supp. 40 (S.D.N.Y. 1955).

limitations on the sovereignty of individual states. This, it was argued, is evident from the way the EC has created a "new legal order of international law".[20] The following chapter extends the scope of this issue to enforcement powers of states in antitrust matters, which transcend national boundaries. It will be argued in that context that curtailing reliance by individual states on the doctrine of extra-territoriality can be regarded – albeit indirectly – as a kind of limitation on the sovereignty of the states concerned.[21] Judged properly, such a limitation does not necessarily need to be regarded as either severe or undesirable. It can simply be seen as a necessary concomitant of the creation and/or operation of an international system of antitrust.

(C) Towards an international system of antitrust

The first thing to be said about sovereignty and an international system of antitrust is that one cannot expect the latter to be as far reaching as either the Constitution of the US or the Treaties establishing the EC, and later the EU. For this reason, it would be an exaggeration, in principle, to hold that establishing an international system of antitrust would open up a relinquishment/acquisition of sovereignty debate *in absolute terms*. In other words, it would not be possible to argue that under this system, states would absolutely lose their sovereignty and that whatever autonomous institutions were created under it would become wholly sovereign as a result. Nevertheless, as the above discussion made clear, a limitation on national sovereignty in this respect can be expected.

1. The existence of an international system of antitrust

It would be a misuse of the concept of sovereignty to maintain that the existence of autonomous institutions in an international system of antitrust, endowed with the competence to bind different states, is incompatible with the sovereignty of contracting states under the system. The freedom of action of the contracting states would certainly not be any more restricted under this system than by, say, the EC. Yet, the difference between these two systems and between this system and all other

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[20] See chapter 6, note 10.

[21] Arguably, reliance on the doctrine of extra-territoriality in antitrust seems to be triggered by sovereignty concerns. One can expect that certain states would claim that their aim in enforcing their antitrust laws extra-territorially is based on the need to protect their interests and prerogatives. Not infrequently such interests and prerogatives have been identified as defences of national sovereignty. See further chapter 8.

international systems remains only a quantitative, not a qualitative one, since under any legal order – whether national, regional or international – unlimited freedom of action for states is impossible.

An international system of antitrust in this case may, as an international order with binding powers, differ from other international systems, but only in the degree of its centralization. It is not correct therefore, to say that such a system owing to its centralized character, should necessarily cause states to no longer be considered sovereign or for them to be deprived of the power to legally act independently in the international community. Neither the fact that autonomous institutions exist within the system does very much restrict the freedom of action of the contracting states, nor the fact that the system is more centralized than other international systems justifies the argument that the existence of the system is incompatible with the nature of public international law or the sovereignty of states. In any event, it is doubtful whether an international system of antitrust would be more centralized than the EC. Yet, in the case of the latter it is difficult to seriously assert that there has been a complete relinquishment of sovereignty.

2. Transfer of competence

In creating an international system of antitrust, one can expect a transfer of competence bottom-up under the system, from the national level to the international level. Of course, there are difficulties if only some states, as opposed to all states, commit themselves to such transfer of competence. For example, this would bring the entire existence of the system into question, in terms of how international this system would be. This issue is dealt with below.[22]

The present chapter concentrates on this transfer of competence as opposed to its consequences. In particular, the chapter examines whether sovereignty does or does not presuppose a minimum competence, i.e. whether the sovereignty of a state would be unaffected if that state were to transfer its competence to autonomous institutions in an international system of antitrust. In light of the view that sovereignty within public international law can mean only the legal authority or competence of a state limited and limitable only by public international law the conclusion can be drawn

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[22] See chapter 10.

that establishing an international system of antitrust in the sense of transfer of competence from national to international level should not necessarily amount to an infringement of the sovereignty of states.

However, creating an international system of antitrust would be problematic if there would be an over-emphasis on the significance of the basis for the specific legal order which the contracting states establish. If the basis is a treaty, then it will be international law and would remain so, then the parties concluding that treaty will be subordinated to public international law alone – i.e., they will still be sovereign. Quite different is the case where a constitution of a federal state is established by an international treaty. Here national law arises from public international law. In separating treaties and constitutions into strict categories – public international law and national law – the above view that sovereignty may be relinquished only in quantity but not in quality can be upheld – i.e. that under a treaty the freedom of state action may be more or less restricted, without the relinquishment of sovereignty.

Yet, there is a risk of over-formalism in this regard. If state A transfers its legislative competence in antitrust policy to state B, by establishing a framework between them, then from state A's standpoint, it is no longer the treaty implementing the framework that represents the highest level of the legal order, but rather state B's domestic system of antitrust. From the perspective of state B, it has full freedom of action as against state A, wherefore the new framework has become wholly incorporated into state B's sphere of power. Hence, there would be no international system of antitrust in the true sense of the word (denoting an agreement between states), since the system would extinguish the existence of state A in the world community. Therefore, it is important to distinguish between different systems of antitrust. A true international system of antitrust would first of all involve more than two different states, and secondly it would not involve a transfer of competence from one state to another.

Thus, loss of quality as a state happens as the law created by the system assumes the character of national law because of the centralization of the order constituted under the system, as in the case of a treaty by which a federal state is established. Regarding the international law status of state A, in the example above, it can be said that the order constituted by the agreement between state A and state B is international only

with regard to its creation by a bilateral international agreement, but not regarding its structure.

The conclusion then is that states, in order to be subjects of public international law, must be sovereign within a particular territory, and in order to be sovereign they must enjoy a threshold minimum competence. However, the state's competence must be enjoyed only in a horizontal respect – as against other states – and not in a vertical respect – as against public international law.

IV. THE EMERGING ORDER

Understanding the concept of sovereignty and its place and relevance to the internationalization of antitrust policy initially requires an examination of the nature and evolution of sovereignty, both at a conceptual framework, and as it emerges in contemporary political practice. Accordingly, the above discussion looked at these basic issues, briefly showing how the modern idea of sovereignty has emerged over the centuries as a particular way of associating the structure of political power with a corresponding structure of territorial space.

(A) Is the state the principal actor?

The theory of sovereignty portrays a world in which supreme power is exerted within a particular territorial boundary. Who or what exerts that power may not be straightforward, but it is usually assumed to be sovereign states. Consistent with this idea, nation, state and national power are often considered to coincide to form the "nation-state". Within its own boundaries the state enjoys supremacy; recognizing no superior authority. Beyond the national boundaries are other sovereign states.

In this image of the world, the principal actor is the nation-state. States are characterized by their particular national territories, national preferences and national interest and policy considerations. Associated with that territory are all the people who live within it – including undertakings operating therein – and who identify themselves as members of the national community.

(B) How has sovereignty evolved?

One may of course anticipate an important conclusion that the theory of sovereignty is limited, either as a description of how the world is, how it is evolving or how it might develop. It is important to observe the ongoing process of relentless globalization. Not only is the world experiencing progressive integration but, perhaps paradoxically, it is also witnessing a process of progressive decentralization of power and authority.

(C) The existence of other players

Paradoxically, although the activity of states has been expanding, their role has increasingly been focused on the central goal of creating a suitable environment for their domestic undertakings to compete in what has become global markets. In attempting to meet this objective, the state is by no means the only player. International organizations such as the OECD and regional organizations such as the EC, play an increasingly complex and vigorous role in cultivating and shaping antitrust law and policy as well as other laws and policies.

In this environment, the discourse of sovereignty may tend to marginalize many questions which increasingly seem relevant. These include the extent to which one can expect or rely on the state to shape technological change to meet social or national objectives, the extent to which the state can be said to be sovereign over a domain in which technological development is in part drawn from within it and in part required from outside, the extent to which the nation-state can even be said to be setting its own agenda and the extent to which due to level of independence this can reasonably be considered possible.

Today's world is one of continuous and fast transition, with major implications for governments, business undertakings, communities and various other interest groups alike. This has brought about particular challenges, including how the relationship between the different players should be regulated, and whether the state should be considered the principal actor. The answers herein may not be obvious, but clearly any alternative perspective to that depicted by the discourse of sovereignty must be sensitive to the significance of the economic and technological transformations. But the impact of change goes well beyond these factors.

(D) The emergence of business power on the international scene

The present section does not examine in detail the relationship between sovereign states and private business undertakings, since this is an issue that is carefully covered in later parts of the thesis.[23] The section merely provides some description of this relationship in the context of the present chapter.[24]

States and business undertakings stand in complete contrast. A state is expected to protect the public interest, and for long it was regarded as the only device for public participation and control in the shaping of society. Undertakings, by contrast, exist to promote their self-interests. The interesting developments which emerged during the twentieth century have dictated that the growth of multinational enterprises (MNEs) has been matched by the growth in government regulation of economic activity, including regulation of MNEs outside national boundaries.[25]

The theory and practice of political economy has for many years experienced no major problems with this: if an undertaking was deemed to limit individual freedom, the state concerned could, and sometimes did, intervene to prevent this. In other words, as communities of states developed and expanded, the sovereign powers of states developed and expanded in parallel, and continued to regulate those communities. This has led scholars such as Gilpin to profess the existence of a contrast between the state and the market. Gilpin has argued that underlying the state are the concepts of territory, loyalty, exclusivity and the monopoly of the legitimate use of coercion. Markets, on the other hand, are associated with the concepts of functional integration, conceptual relationships and expanding inter-dependence with consumers.[26] According to Gilpin, these present fundamentally different ways of

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[23] See chapter 10.

[24] A useful discussion of these issues, especially with regard to the previous and contemporary positions can be found in Muchlinski, ch 1, note 4 *Ante*.

[25] For an account on the definition of the term "MNEs" see Muchlinski, at pp 12-5, note 4 *Ante*. See also the work of other scholars such as Stopford and Strange, who have argued that the fact that the activities of MNEs can regulated and the fact that this may place them in a weak position promotes rather than excludes adopting a co-operative approach when examining the relationship between States and MNEs. See J. Stopford & S. Strange *Rival States, Rival Firms* (Cambridge University Press, 1991).

[26] See the interesting views of J. Jackson about markets and their relationship with States, noting in particular that "markets can be very beneficial, and, even when not beneficial, market forces demand respect and can cause great difficulties when not respected". See J. Jackson *The Jurisprudence of GATT and the WTO* (Cambridge University Press, 2000), ch. 1, at p 6.

ordering human relations, and the tension between them has had a profound impact on the course of modern history and is a crucial problem in the study of political economy.[27]

However, as the economic activity of undertakings is increasingly becoming more global, this description of the relationship is changing accordingly. It has been argued, that for the last three decades there has been an uncovenanted transfer of sovereignty from states to international undertakings; instead of being pooled (as it were) upwards into inter- or supra-national resevoirs of a consciously political nature (where it should be placed); sovereignty is seeping away downwards into the invisible tuber system of politically irresponsible business power.[28]

Such development seems to have enabled undertakings involved in international operations to evade or circumvent the laws of states, and therefore democratic control. With an increased process of globalization, these undertakings can employ their personnel and corporate structure to drain know-how away from one state to another in less than it takes to tell a tale. As Weintraub convincingly argued, it is total futility to talk about a "US undertaking" or a "German undertaking" when the factories of the undertaking are located in Malaysia, its IT programmes in India, and its executives are recruited worldwide.[29] The effect of this situation can, *inter alia*, mean that undertakings may choose to operate in jurisdictions with lax antitrust law enforcement. Thus, those undertakings will be able to avoid jurisdictions where antitrust law is strictly or seriously enforced.

International political economy seeks to explain international political-economic relations and how they affect the global systems of production, exchange and distribution. International political economy views the nation-state as the key actor in the global system, and the organizor of the international political order. The state is treated as the alternative to the market, which in turn is seen as the organizor of

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[27] See R. Gilpin *The Political Economy of International Relations* (Princeton: Princeton University Press 1987), at pp 10-1.

[28] See L. Eden "Bringing the firm back in: multinationals in international political economy" in L. Eden & E. Potter (eds) *Multinationals in Global Political Economy* (New York, 1993).

[29] R. Weintraub "Globalization effect on antitrust law" (1999) 34 *New Eng. L. Rev.* 27, at p 27.

economic relations. As the above reference to Gilpin shows, there seems to a particular emphasis on this contrast between "states and markets".

However, the concept of states versus markets is flawed because the market is a structure, not an actor, and hence can not be considered a counterpart to the state. The appropriate counterpoint is the multinational undertakings, the key non-state actor dominating both domestic and international markets.

Control by the state of business power led to the latter being used by the former to further many goals and national interests, in particular to extend the jurisdictional reach of domestic antitrust laws beyond territorial limits. As the following chapter demonstrates, the US in particular practised this method of extra-territoriality.[30]

V. CONCLUSION

This chapter has dealt with the concept of sovereignty, and how is it expressed in current political analysis, its relevance to the internationalization of antitrust policy and it impact on this process and *vice versa*.

This sovereignty discourse is of far more than peripheral interest. It is the way in which mainstream discussions of many of the most contentious issues in the world are advanced, arbitrated and resolved. Yet, compared to the authority which the concept should exert, its basis and validity have received remarkably little attention.

True, there is a body of literature dealing with some aspects of sovereignty – in particular the relation between sovereignty and public international law, and the relationship between sovereign states and their corresponding national communities. Nevertheless, overarching questions about the enduring value of the concept as a way of explaining how power in the contemporary world is actually exercised, or how change may be achieved, remain outstanding and require urgent attention. The purpose of this chapter was to explore a number of these questions and pave the way for finding answers.

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[30] See R. Vernon *Sovereignty At Bay: The Multinational Spread of U.S. Enterprises* (New York, 1971), at pp 231-47; "Sovereignty at bay: ten years after" (1981) 35 *Int'l Organization* 517.

It is clear that an international system of antitrust will not prevent a state system from co-existing. However, it seems that such a system may override the construct of sovereignty to the extent necessary to achieve common goals. If there remain additional concerns on the part of states concerning sovereignty, then such concerns can be alleviated by introducing a principle of subsidiarity. Under this principle, states can continue to exercise those functions, which they can better perform than autonomous institutions within the system.[31]

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[31] See for example Article 5 EC which contains the principle of subsidiarity under EC Law. Some discussion on the issue can be found in chapter 6. See further J. Trachtman "L'etat, c'est nous: sovereignty, economic integration and subsidiarity" (1992) 33 *Harv. Int'l L. J.* 459, at p 460.

Chapter Eight

EXTRA-TERRITORIALITY

This chapter examines the doctrine of extra-territoriality in antitrust policy and the difficult issues it has triggered over the years. Part I considers the question of jurisdiction under public international law. Part II evaluates some fundamental issues underlying extra-territoriality. It advocates the view that the difficulties with extra-territoriality reside not only in the conflicts it has caused between states, but also in the search for a compelling definition of it. Part III gives an account of developments in the US and the EC in the area. Part IV deals with the responses of states, which have been generated by reliance on extra-territoriality by other states. Part V provides some reflections on extra-territoriality. It examines, *inter alia*, the role of the judiciary in asserting extra-territorial jurisdiction in antitrust policy. Part VI examines and offers some proposals on how to avoid or minimize conflicts triggered by extra-territoriality. Finally, part VII concludes.

I. THE QUESTION OF JURISDICTION

(A) Traditional principles

It is apparent from the previous chapter that a fundamental attribute of sovereignty resides in the fact that an individual state is competent to enact laws that are binding upon persons as well as regulating conditions within its national boundaries.[1] This fundamental attribute of sovereignty arises from an important principle under public

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[1] The ability of a state to enact and enforce its laws rests primarily on two grounds. The first is subject-matter jurisdiction, also known as legislative or prescriptive jurisdiction. According to this type of jurisdiction, a state has competence to enact laws, meaning "to lay down general or individual rules through its legislative, executive and judicial bodies". The second is enforcement jurisdiction. This type of jurisdiction covers a state's ability to enforce its laws, that is "the power of a state to give effect to a general rule or an individual decision by means of substantive implementing measures which may include even coercion by the authorities". See Opinion of Advocate General Darmon in *A. Ahlström Osukeyhtiö v. Commission* (*Woodpulp*) [1988] 4 CMLR 901, at p 923.

international law, namely the principle of territoriality.[2] On the basis of this principle, a state is able to enact and enforce laws within its boundaries. If a state seeks to assert jurisdiction over acts committed beyond its borders it might infringe the sovereignty of other states, an action which can amount to a violation of principles of public international law. Yet as public international law developed, it became apparent that exceptions to the principle were inevitable. Several exceptions, therefore, have been introduced where the competence of states may extend to certain situations beyond their national boundaries.[3] One exception is the nationality principle, which allows a state to assert jurisdiction over its nationals abroad.[4] A second exception is the protective principle of jurisdiction which permits a state to regulate offences abroad targeting its national security such as its political independence or territorial integrity. A third exception relates to the passive personality principle which covers situations in which a state will be able to assert jurisdiction over acts committed beyond national boundaries, that harm its nationals abroad. A fourth exception is the objective territoriality principle, namely when an act is commenced outside the boundaries of a state but concluded within its territory.[5]

However, beyond the principle of territoriality and its exceptions, the competence of a state to assert jurisdiction over situations outside its territory, especially those involving foreign individuals, becomes highly questionable. In this situation, more than one state may assert jurisdiction, which means that a conflict is likely to arise between those states. Nevertheless, generally it is thought that as long as a state does not attempt to apply its laws to conduct performed within the territory of another

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[2] See P. Brown "The codification of international law" (1935) 29 *Am. J. Int'l L.* 25; I. Brownlie *Principles of Public International Law* (Oxford, 1998); R. Jennings & A. Watts (eds.) *Oppenheim's International Law*, vol. 1 (London: Longman, 1996), at pp 456-88; F. Mann "The doctrine of jurisdiction in international law" (1964) 111 *R. D. C.* 9; M. Akehurst "Jurisdiction in international law" (1972-3) 46 *B. Y. Int'l L.* 145; D. Rosenthal & W. Knighton *National Laws And International Commerce: The Problem of Extra-territoriality* (Routledge & Keagan Paul, 1982); A. Lowe *Extra-territorial Jurisdiction: An Annotated Collection of Legal Materials* (Cambridge, Grotius, 1983); C. Olmstead *Extra-territorial Application of the Laws and Responses Thereto* (Oxford, 1984); B. Hawk *United States, Common Market and International Antitrust* (Princeton Hall Law & Business, 1993).

[3] See P. Muchlinski *Multinational Enterprises and the Law* (Blackwell, 1995), at pp 124-6 for an interesting discussion of these exceptions, apart from the passive personality principle, in relation to the regulation of multinational enterprises.

[4] Under customary international law, a state is able to enforce its laws against its nationals, even when these laws have some effects beyond national borders. See *France v. Turkey* (S.S. "Lotus") (1927) *P.C.I.J.* 9, at p 19; *Denmark v. Germany* (North Sea Continental Shelf) (1968) ICJ 3, at p 44-5.

state, a mere assertion of the subject-matter jurisdiction by the former over individuals in the latter may not lead to any conflict between the states concerned or to a violation of principles of public international law. Should the former seek enforcement though, the possibility of conflict and violation becomes obvious.[6]

(B) Areas of economic law

The above principles of public international law were initially developed in the context of physical conduct – for example the scenario of the poison –[7] and not in a context of economic conduct – for example in the case of an agreement between business undertakings. Whether these principles could be invoked in the latter context was, for some time, considered to be a difficult conundrum. These principles did not seem to be sufficient to address questions of economic conduct, since they emerged with physical conduct in mind. Thus, it was not clear whether an individual state could assert jurisdiction over acts committed beyond its borders on the basis that these acts produced economic effects within its territory.

1. The "effects" doctrine

To solve this conundrum, harmful economic effects were considered to be equivalent to effects of physical conduct originating from the territory of one state but concluded in another. This shift in position has received recognition, not under public international law, but in the jurisprudence of certain states.[8] Given the imperative to address such economic harm, some states adopted an expansive concept of competence. In doing so, they have heavily relied on a doctrine of "effects", which has served as a basis to the doctrine of extra-territoriality in antitrust policy.

The US was amongst the first of those states to recognize the "effects" doctrine,[9] though it was believed at one point that US antitrust laws did not apply to activities

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[5] International lawyers have frequently cited the example where one person sends poison from one state to another as an adequate illustration.
[6] See Rosenthal & Knighton, note 2 *Ante*.

[7] See note 5 *Ante*.

[8] See D. Gerber "The extraterritorial application of German antitrust law" (1983) 77 *Am. J. Int'l L.* 756, at pp 791-3.

[9] See Stroock, Stroock and Lavan "Convergence of trade laws and antitrust laws: unilateral extraterritorial U.S. antitrust enforcement – can it work to open Japan's markets?" in H. Coretesi (ed.)

outside the US.[10] In *United States v. Sisal Sales Corporation*, the Supreme Court allowed jurisdiction over conduct taking place within and outside the borders of the US.[11] A similar conclusion was reached twenty years later in the famous case of *United States v. Aluminum Co of America (Alcoa)*, in which Judge Learned Hand crafted the proposition that the US can assert jurisdiction over a cartel agreement concluded outside its territory by foreign undertakings, with the US undertaking not being party to the agreement. He stated that:

> "It is settled law . . . that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which has consequences within its boarders which the State reprehends; and these liabilities other States will ordinarily recognize."[12]

Judge Hand reasoned that it was irrelevant under such circumstances that the agreement was of a completely foreign nature. Such an agreement could still be declared unlawful because a state may punish an economically harmful act, which it may reprehend, even if committed by individuals beyond its borders.[13]

2. A comment

It is important to shed some light on the justification for employing the effects doctrine as a valid basis for asserting jurisdiction over foreign situations. Several factors can be found on which this justification can be based. First, it is obvious that the territoriality principle falls short of guarding the legitimate interest of a state in areas of economic relations.[14] An individual state which asserts subject-matter jurisdiction in antitrust policy aims to ensure proper protection of its national

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Unilateral Application of Antitrust and Trade Laws: *Toward A New Economic Relationship Between the United States and Japan* (New York: the Institute, 1994), at p 114.

The origins of the doctrine of extra-territoriality are illustrated in several antitrust laws in the US. See the Sherman Act (1890), the Clayton Act (1912), the Robinson-Patman Act (1936), the Hart-Scott-Rodino Antitrust Improvements Act (1976), the Wilson Tariff Act (1994) and the Federal Trade Commission Act (1994).

[10] See *American Banana Co v. United Fruits Co.* 213 US 347 (1909) in which the Supreme Court held that the Sherman Act did not apply to activities outside the US (*American Banana*).

[11] 274 U.S. 268 (1927).

[12] *Ibid*, 148 F 2d 416 (2nd Cir., 1945), at p 444.

[13] *Ibid.*, at p 443.

[14] See D. Turner "Application of competition laws to foreign conduct: appropriate resolution of jurisdictional issues" (1985) *Fordham. Corp. L. Inst.* 231, at p 233.

economic order, and is justified by the fundamental rights of states to self-determination. In light of the increasing inter-dependence of states and the significance of international trade for the welfare of nations, it is difficult to disagree with the logic behind adopting an effects doctrine. Following the territoriality principle in an area of economic law, such as antitrust, would place already strong undertakings in a position to evade all national regulation.[15] Undertakings would therefore be able to engage in harmful economic conduct without being subjected to any form of supervision, since their acts would have been committed "beyond" national boundaries.[16]

Secondly, under public international law, an individual state's assertion of jurisdiction needs to satisfy a requirement of a sufficiently close or reasonable link between its territory and the acts taking place beyond national boundaries.[17] States cannot assert jurisdiction if the minimum requirement of such national nexus is not met. Since jurisdiction in antitrust law cases cannot be asserted without the presence of direct, substantial and foreseeable anti-competitive effects, the effects doctrine can be said to meet this requirement of a reasonable link. In the absence of a definition in international law of direct, substantial and foreseeable effects, individual states will individually decide on the matter, using a minimum standard of reasonableness. Thirdly, although conflicts between states over the application of extra-territoriality – especially in the case of the US – have arisen in the context of actions brought against foreign undertakings, many cases do involve domestic undertakings as well.

In light of the above factors, the effects doctrine can be regarded as a legitimate basis to assert jurisdiction over acts committed abroad, but which adversely impact upon domestic situations *under certain circumstances*. It is essential to limit this proposition to certain circumstances. For example, there is no reason why, in principle, the validity of the effects doctrine should not be questioned, if the state relying on it fails to take into consideration the sovereign interests of other states. The

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[15] Indeed, strict territoriality may transform states into havens in which undertakings could evade rules combating anti-competitive behaviour. This may well result in harm to consumers and competitors of those undertakings. See D. Gerber "Afterword: Antitrust and American Business Abroad revisited" (2000) 20 *Nw. J. Int'l L. & Bus*. 307. Also, chapter 1, note 6.

[16] T. Dunfee & A. Friedman "The extra-territorial application of United States antitrust laws: a proposal for an interim solution" (1984) 45 *Ohio State L. J.* 883, at pp 889-90.

[17] See Mann, note 2 *Ante*.

most effective way of taking account of such interests would be for states to adhere to the principles of public international law. It seems, therefore, that although the effects doctrine may constitute a legitimate basis for asserting jurisdiction, its assertion is not absolute, i.e. it is subject to certain conditions – imposed under international law – which an asserting state must satisfy.[18] This is particularly so if the aim to minimize or eliminate conflicts arising as a result of extra-territoriality between states is to be achieved.

II. SOME FUNDAMENTAL ISSUES

(A) Definition

It is desirable to examine whether extra-territoriality is susceptible to some kind of definition, especially since this issue has not received any adequate attention in the literature. It is submitted that proposing a compelling and shared definition is difficult, if not impossible. Perhaps the best definition that can be offered, it seems, is that the antitrust laws of a state are extra-territorially applied in a specific case when that case contains "foreign elements". Even then, the concept of "foreign elements" defies a general definition, especially in areas of economic law. For this reason, it is suggested that instead of searching for a definition, one should focus on identifying situations of extra-territoriality. Hence, all that can be supplied are examples: acts wholly or partly performed, contracts wholly or partly concluded etc., beyond the boundaries of the state. Still the term "beyond" would remain undefined. When, for example, is an act performed beyond those boundaries?

When talking about extra-territoriality in antitrust policy, at least three different situations can be envisaged: first, when antitrust laws of state A are applied by the judiciary and antitrust authorities of state B within the latter's territory; secondly, when these laws are applied by the judiciary and antitrust authorities of state A within state B; thirdly, when the same laws are applied by the judiciary and antitrust authorities of state A within its territory, but somehow affect undertakings operating in state B.

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[18] See R. Alford "The extraterritorial application of antitrust laws: the United States and the European Community approaches" (1992) 33 *Virginia J. Int'l L.* 1, at p 5.

The specific situation identified in the present discussion is where a state applies its domestic antitrust law(s) to the behaviour and activities of foreign undertakings taking place beyond national boundaries. Certain parts of this definition merit special emphasis. The ability of a state to control activities of its own undertakings beyond its own boundaries should be distinguished from its ability to control activities of foreign undertakings under similar circumstances. Whilst the former seems to be a recognized principle under public international law, the latter does not seem to have equal recognition, and thus it has given rise to classic questions of jurisdiction, which are amongst the most important and intractable conflicts of public international law.[19]

(B) Extra-territoriality and the internationalization of antitrust policy

There are strong links between extra-territoriality and the internationalization of antitrust policy. First, arguably, relying on extra-territorial application of domestic antitrust laws would reduce the incentives of states for the internationalization of antitrust policy in a "bilateral" or "pluralist" sense. If, by relying on its own antitrust laws, a state is independently able to control activities beyond its boundaries, then its willingness to co-operate with other states on the international plane will not be particularly strong, unless it could achieve better results through co-operation.[20] Secondly, an increased reliance on the doctrine of extra-territoriality will lead to an increase in conflicts between states, especially since the number of states instituting systems of antitrust has been rising.[21] In light of this, a state's extra-territorial application of its antitrust laws would not necessarily be regarded as acceptable to other states. The reverse is often true. Experience in this area shows that many states have not been in favour of other states' reliance on extra-territoriality in antitrust

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[19] See A. Lowe "The problems of extraterritorial jurisdiction: economic sovereignty and the search for a solution" (1985) 34 *Int'l Comp. L. Q.* 724, at p 727.

[20] This point can be illustrated with reference to the US and its use of its antitrust law in the period between 1930s and 1950s. As chapter 10 shows, the US, while expressing its views in favour of co-operation, delivered major blows to the efforts of states at that time to internationalize antitrust policy. At that time, "the US sat astride the world. The US government set the tone for much that happened in the no-communist world, and US economic interests tended to dominate international markets. This situation induced or at least encouraged American legal and political decision-makers to extend the reach of US antitrust law to conduct within the territory of other countries. After all, the US had discovered the value of antitrust, and it was 'doing the rest of the world a favor' by using it to shape international economic relations". See Gerber, at pp 307-8, note 15 *Ante*.

[21] R. Whish *Competition Law* (Butterworths, 2001), at p 369. Also, see chapter 1, note 4.

policy.[22] If a state's motive for applying the doctrine is to guard its national sovereignty,[23] then other states' defiance of such a move, because they view this move as an intrusion into their internal affairs and territorial integrity and thus as a violation of their national sovereignty, should not be regarded as unacceptable.[24] Thirdly, the resulting situation from extra-territorial application of national antitrust laws would be one of national antitrust imperialism in the world, where strong states will be able to impose their standards on other states.[25] Fourthly, examining extra-territoriality in antitrust policy paves the way to examining the role of the judiciary in the internationalization of antitrust policy and ultimately in an international system of antitrust.[26] To this end, it is important to evaluate the contribution of the judiciary towards harmonization of antitrust policy standards on the international plane. At present, however, extra-territorial application of domestic antitrust laws, as sought by antitrust authorities and recognized by the judiciary in certain jurisdictions, conflicts with public international law.[27] Finally extra-territoriality, both in theory and practice, concerns situations which extend beyond the national level and move more towards the international plane. Therefore, strong links seem to exist between extra-territoriality and the internationalization of antitrust policy. By way of stating a sub-conclusion, one could argue that an increased reliance on the doctrine of extra-territoriality represents a step in the opposite direction to a groping for a meaningful internationalization of antitrust policy.

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[22] See pp 164-9 *Post*.

[23] See chapter 7, note 21 and accompanying text.

[24] See Justice Holmes in *American Banana* where he said that the lawfulness of an act "must be determined wholly by the law of the country where the act alone is done". Otherwise, the assertion of jurisdiction would be unjust and would be an interference with the sovereignty of another nation, which the other nation "justly might resent". *American Banana*, at p 356.

[25] It has been argued that in applying its antitrust law extra-territorially, the US was, in the view of states, imposing respect for its antitrust laws on the entire world in order to serve US interests and promote its economic ethic. See D. Rishikesh "Extraterritoriality versus sovereignty in international antitrust jurisdiction" (1991) 14 *World Comp.* 33, at p 36. See also note 20 *Ante*.

[26] This aspect of the debate would also complement the discussion in chapter 4, on the role of law courts.

[27] This view was even correct fifty years ago. See G. Haight "International law and extraterritorial application of the antitrust laws" (1954) 63 *Yale L. J.* 639, at p 640.

(C) The political dimension

Defining extra-territoriality in terms of situations of foreign developments and occurrence beyond national boundaries would almost bring one close to assuming that conflicts triggered by extra-territoriality may appear to be only a "dry" debate about jurisdiction and international law. Nevertheless, it will be argued that extra-territoriality lies in the crossroads between law and politics and that the conflicts it has triggered, involve important political questions,[28] such as who can make and enforce rules regulating behaviour of business undertakings.[29] In other words, the argument will be made that the nature and content of the doctrine is as much political as legal.[30] Consequently, it is necessary to examine the legal and political limits of extra-territoriality.

III. DEVELOPMENTS IN THE US AND THE EC

(A) The US

1. After Alcoa

The *Alcoa* case gave rise to conflicts between the US and other nations.[31] Due to the controversy surrounding the case – and in the light of the protests by foreign nations – later formulations of the effects doctrine by US courts had to be more carefully worded.[32] To this end, some US courts began to draw on the principle of judicial

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[28] H. Maier "Extraterritorial jurisdiction at a crossroads: an intersection between public and private international law" (1982) 76 *Am. J. Int'l L.* 280.

[29] See chapter 3.

[30] Several writers have argued – quite incompletely – that the problem of extra-territoriality is one of legal conflict. See generally Rishikesh, note 25 *Ante*.

Against this, some writers have argued that disputes arising as a result of extra-territoriality are not simply about legal theory; they are equally disputes about the policy objectives the law should serve. See J. Bridge "The law and politics of United States foreign policy export controls" (1984) 4 *Legal Stud.* 2; Lowe, at p 724, note 19 *Ante*.

[31] See K. Brewster *Antitrust and American Business Abroad* (McGraw-Hill, 1958), at pp 46-51; W. Fugate *Foreign Commerce and Antitrust Laws* (Little, Brown, 1958), at pp 344-6; N. Katzenbach "Conflicts on an unruly horse: reciprocal claims and tolerance in interstate and international law" (1956) 65 *Yale L. J.* 1087, at pp 1148-9; D. Rosenthal "Relationship of U.S. antitrust laws to the formulation of foreign economic policy, particularly export and overseas investment policy" (1980) 49 *Antitrust L. J.* 1189, at p 1193; Mann, p 104, note 2 *Ante*; J. Sandage "Forum non conveniens and the extraterritorial application of United States antitrust laws" (1985) 94 *Yale L. J.* 1693, at 1694.

[32] In the case of *Timberlane*, the US Court of Appeal held that the effects doctrine as enunciated in *Alcoa* is "by itself . . . incomplete because it fails to consider other nations' interests. Nor does it

comity,[33] which seems to follow from the work of a prominent scholar in the late 1950s, in which he advocated a "jurisdictional rule of reason", which involves a balancing exercise between national and foreign interests in a broad sense.[34] In *Timberlane I*, the US Court of Appeal for the Ninth Circuit stated a number of factors that must be taken into account in this balancing exercise. These include:

> "The degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the US as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the US as compared with conduct abroad."[35]

Thus, in opting for a narrower approach,[36] it seems that some US courts have attempted to limit the scope of application of the doctrine by demanding not only the existence of a direct and substantial effect within the US, but also a balancing of the respective interests of the US in asserting jurisdiction, and of any other state which might be offended by such assertion.[37]

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expressly take into account the full nature of the relationship between the actors and this country". See *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), at pp 611-2. See also Alford, at p 10, note 18 *Ante*.

[33] The term "comity" describes a general principle that a state should take other states' important interests into account in its law enforcement in return for their doing the same. The US Supreme Court has defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens". See *Hilton v. Guyot*, 159 U.S. 113, 163-4 (1865). See also *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, at 937(D.D. Cir. 1984), where it was held that "the central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability". See H. Yntema "The comity doctrine" (1966) 65 *Mich. L. Rev.* 1.

[34] See Brewster, note 31 *Ante*. See also Gerber, at p 308, note 15 *Ante*.

[35] 549 F.2d, at p 614.

[36] In spite of this narrowing of the scope of the doctrine however, other states still held the view that the doctrine offended against common principles of public international law. See generally A. Neale & D. Goyder *The Antitrust Laws of the United States of America: A Study of Competition Enforced By Law* (Cambridge University Press, 1980).

[37] See Whish, at p 372, note 21 *Ante*; E. Fox "Extraterritoriality and antitrust-is reasonableness the answer?" (1986) *Fordham Corp L. Inst.* 49.

It is arguable however, whether US courts fully endorsed the idea of reasonableness expressed in the *Timberlane* factors. Compare *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979) (adopting similar factors) with *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F. 2d 909 (D.C. Cir. 1984) (questioning the effectiveness of the factors).

2. The FTAIA approach

In 1982, the US Congress adopted the Foreign Trade Antitrust Improvements Act (1982) (FTAIA) to simplify the appropriate extra-territorial reach of US antitrust laws.[38] To this end, the Act established a uniform test, whereby jurisdiction could only be asserted over conduct that has a "direct, substantial, and reasonably foreseeable" effect on US domestic or export commerce. The Act seems to be neutral regarding the "jurisdictional rule of reason" – as adopted in *Timberlane*. This is evident from the legislative history of the Act, where it was stated that prior to its final adoption that the bill was intended neither to prevent nor to encourage additional judicial recognition of the special international characteristics of transactions. The bill also provided that it would have no effect on the courts' ability to employ notions of comity or otherwise to take account of the international character of transaction where a court determines that the requirements of subject-matter jurisdiction were met.[39] Nevertheless, the Restatement (Third) of the Foreign Relations Law in the US (1988) adopted the "jurisdictional rule of reason" type of approach.[40] The Restatement considered that a balancing approach, derived from the principle of judicial comity, was necessary by virtue of principles of public international law.[41]

3. Guidelines of enforcement authorities

The US antitrust authorities have not been consistent in their application of the doctrine of extra-territoriality. Some twenty years ago, the Department of Justice stated that the main purpose of extra-territoriality was to protect US export and investment opportunities against private restrictions. It also stated then that its concern was that each US-based undertaking exporting goods, services or capital should be allowed to compete and not be kept out of foreign markets by some restriction

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[38] The Act amended the Sherman and the Federal Trade Commission Acts in regards to export commerce and wholly foreign conduct, but not with respect to import commerce.

[39] See H.R. Rep. No. 97-686 (1982), at p 10.

[40] See D. Murphy "Moderating antitrust subject matter jurisdiction: the Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations Law (Revised)" (1986) 54 *Uni. Cincinnati L. Rev.* 779.

[41] See in particular Sections 402, 403 and 415 of the Restatement. For a good discussion of these provisions see Alford, at pp 23-7, note 18 *Ante*.

introduced by a stronger or less-principled undertaking.[42] A few years later, the Department of Justice seems to have abandoned this concern and to transpose the consumer welfare objective into its operations within the international sphere.

In its reaction to the test of reasonableness, the Department of Justice stated in its 1988 Guidelines that in taking enforcement actions against export restraints that harmed consumers in the US and its exports, the idea of reasonableness was a matter of "prosecutorial discretion" rather than law:

> "Although the FTAIA [Foreign Trade Antitrust Improvements Act] extends jurisdiction under the Sherman Act to conduct that has a direct, substantial and reasonably foreseeable effect on the export trade or export commerce of a person engaged in such commerce in the United States, the Department is concerned with adverse effects on competition that would harm US consumers by reducing output or raising prices."[43]

Early in the 1990s this paragraph was repealed. At the time the Department of Justice explained that US Congress did not intend antitrust law to be limited to cases based on direct harm to consumers, arguing that when both imports and exports are of importance to the US economy, the Department would not limit its concern to competition in only half of US trade.[44] This different line of policy was later inserted into the 1995 Antitrust Enforcement Guidelines for International Operations adopted jointly by the Department of Justice and the Federal Trade Commission which stated that the authorities may, in appropriate cases, take enforcement action against anti-competitive conduct, wherever occurring, that restraints US exports, if: first, the conduct has a direct, substantial and reasonably foreseeable effect on exports of goods or services from the US, and secondly, the US courts can obtain jurisdiction over persons or undertakings engaged in such conduct.[45] Along this new line of policy, the authorities agreed to consider legitimate interests of other nations in accordance with the recommendations of the OECD and various bilateral agreements.[46] The

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[42] See Antitrust Guidelines for International Operations, US Department of Justice, Antitrust Division (1988), at p 5.

[43] *Ibid.*, footnote 159. See M. Lao "Jurisdictional reach of the U.S. antitrust laws: yokosuka and yokota, and 'footnote 159' scenarios" (1994) 46 *Rutgers L. Rev.* 821.

[44] See Department of Justice press release (April 3, 1992) at p 2, <http://www.usdoj.gov>.

[45] Guidelines (1995), note 73.

[46] *Ibid.* By way of extension, note 74 of the Guidelines mentions a number of factors which the authorities would take into account when considering the legitimate interests of other states. These

Guidelines further explain that the Department of Justice would take into consideration, as a matter of "prosecutorial discretion", comity beyond whether there is a conflict with foreign law.[47] The Department of Justice has emphasized that it does not believe that it is the role of the courts to 'second-guess' the antitrust authorities' judgment as to the proper role of comity concerns under such circumstances.[48] Although controversial, such comments seem to make it clear that the US remains determined to tackle foreign conduct that harms its exports, but would do so only after some account has been taken of the would-be reaction by foreign nations to this tact in policy.

4. Hartford Fire[49]

In 1988, several US and UK insurance companies were alleged to have breached the Sherman Act by entering into agreements to alter certain terms of insurance coverage and not to offer certain types of insurance coverage. In their response to the allegations, the UK based undertakings argued that the US courts should not assert jurisdiction over conduct that occurred in another jurisdiction and was lawful there, even if the conduct in question produced effects in the US.

(i) The district court

In its decision, the district court held that it could assert jurisdiction over the conduct of the UK undertakings under the Sherman Act because their decision to refuse to provide reinsurance or retrocessional reinsurance to cover certain types of risks in the US had a direct effect on the availability of primary insurance in the US.[50] In dealing with the international comity point, the court, referring to *Timberlane II*,[51] held that

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factors have been derived partly from previous international guidelines and partly from the 1991 Co-operation Agreement between the US and the EC.

[47] The Guidelines provide, at p 20, that as part of a traditional comity evaluation, the Department of Justice would consider whether one state encourages a certain course of conduct, leaves undertakings free to choose among different strategies, or prohibits some of those strategies. In addition, the Department of Justice would take into account the effect of its enforcement activities on related enforcement activities of a foreign antitrust authority.

[48] *Ibid.*, at pp 21-2.

[49] Case of *Hartford Fire Insurance Co v. California* 113 S. Ct. 2891 (1993).

[50] *In re Insurance Antitrust Litigation.*, 732 F. Supp. 464 (N.D. Cal. 1989), at p 484.

extra-territorial assertion of jurisdiction should give way to international comity considerations.

(ii) The Court of Appeal

Whilst agreeing with the district court on the existence of effects within the US, the Ninth Circuit for the Court of Appeal reversed the former's ruling with respect to the international comity consideration.[52]

(iii) The Supreme Court

The Supreme Court was divided on the issue. By a majority of 5-4, it was held that the Sherman Act does apply to foreign conduct that was meant to produce and did in fact produce some substantial effect in the US.[53] Regarding international comity considerations, it was held that there was no need to decide this question, and that in any case, "international comity would not counsel against exercising jurisdiction in the circumstances alleged", even if asserting jurisdiction over foreign acts usually gives way to international comity considerations.[54]

An important point made in the judgment that is worth mentioning relates to the argument of the UK undertakings and Government, that the challenged conduct was not contrary to UK law and policy. The Court responded to this argument by saying that there was no "true conflict" between UK and US laws.[55] The Court referred to Section 415 of the Restatement (Third), holding that there cannot be a "true conflict" if the undertaking, subject to the laws of two jurisdictions, can comply with both. As there was no "true conflict" in this case, opined the Court, there was no need to

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[51] In *Timberlane II*, the 9th Circuit for the Court of Appeal held that in asserting extra-territorial jurisdiction, a court should examine "(1) the effect or intended effect on the foreign commerce of the United States; (2) the type and magnitude of the alleged illegal behaviour, and (3) the appropriateness of exercising extraterritorial jurisdiction in light of considerations of international comity and fairness". *Timberlane lumber Co. v. Bank of America National Trust & Savings Association*, 749 F. 2d 1378 (9th Cir. 1984), at 1382.

[52] *In re Insurance Antitrust litigation*, 938 F.2d 919, 932 (9th Cir. 1991), at p 934.

[53] 509 U.S. 764 (1993), at p 796, per Justice Souter.

[54] *Ibid.*, at p 798.

[55] *Ibid.*, at pp 798-9.

consider whether a US court should, on the basis of international comity, refrain from asserting jurisdiction.

5. A comment

The judgment of the Supreme Court raises several questions.[56] The view of the majority that for a "true conflict" to exist, compliance with US law should lead to a violation of the law of another nation is difficult to accept. Indeed, in the case itself, Justice Scalia, writing for the minority, described this view as a "breathtakingly broad proposition".[57] One can anticipate that such a view would trigger conflicts between US antitrust law and the legitimate interests of other states. Moreover, the claim may be made that the judgment seems to have misinterpreted the approach of the Restatement (Third). Lowenfeld has written:

> "In determining whether state A exercise jurisdiction over an activity significantly linked to state B, one important question, in my submission, is whether B has a demonstrable system of values and priorities different from those of A that would be impaired by the application of the law of A. I am not suggesting that, if the answer to the question is yes, A must stay its hand. The magnitude of A's interest, the effect of the challenged activity within A, the intention of the actors, and the other factors that I hope will disappear from view remain important. But, conflict is not just about commands: it is also about interests, values and competing priorities. All of these need to be taken into account in arriving at a rational allocation of jurisdiction in a world of nation-states."[58]

By emphasizing the need for a "true conflict", the Supreme Court seems to have departed from previous judgments in which it placed a specific emphasis on the

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[56] Many of these questions have been noted in the literature on the case. See A. Robertson & M. Demetrious "'But that was in another country' . . . The extraterritorial application of US antitrust laws in the US Supreme Court" (1994) 43 *Int'l Comp. L. Q.* 417; V. Gupta "After *Hartford Fire*: antitrust and comity" (1996) 84 *Geo. L. J.* 2287; J. Trentor "Jurisdiction and the extraterritorial application of antitrust laws after *Hartford Fire*" (1995) 62 *U. Chi. L. Rev.* 1583; K. Dam "Extraterritoriality in an age of globalization: the *Hartford Fire* case" (1993) *Sup. Ct. Rev.* 289; L. Kramer "Extraterritorial application of American law after the insurance antitrust case: a reply to professors Lowenfeld and Trimble" (1995) 89 *Am. J. Int'l L.* 750; P. Trimble "The Supreme Court and international law: the demise of Restatement section 403" (1995) 89 *Am. J. Int'l L.* 53; P. Roth "Jurisdiction, British public policy and the Supreme Court" (1994) 110 *L. Q. R.* 194; E. Fox "U.S. law and global competition and trade – jurisdiction and comity (1993) *Antitrust Rep.* 3; S. Calkins "The October 1992 Supreme Court term and antitrust: more objectivity than ever" (1994) 62 *Antitrust L. J.* 327, at pp 361-8; Hawk (Supp. 1993), at p 148, note 2 *Ante*.

[57] At p 820 of the judgment.

[58] See A. Lowenfeld "Conflict, balancing of interests and the exercise of jurisdiction to prescribe: reflections on the Insurance antitrust case" (1995) 89 *Am. J. Int'l L.* 42, at p 51. Lowenfeld was the principal author of the part of the Restatement (Third) on which the Supreme Court relied in its judgment.

importance of taking into account the interests of foreign states,[59] as well as on the need to carefully inquire into the reasonableness of the assertion of jurisdiction in antitrust cases.[60] It seems that it would be preferable for the US courts to refrain from asserting jurisdiction over foreign situations if such an assertion would be unreasonable. This would be in accordance with the Restatement (Third), especially section 403 thereof.[61]

The difficult questions which the judgment raises also concern the use of the sovereign compulsion defence.[62] In the judgment itself the requirement that the challenged conduct be compelled by foreign law appears to confuse the exercise of judicial discretion in the context of international comity with the evidence necessary to establish the affirmative defence of foreign sovereign compulsion. Thus, if the UK undertakings could have established their challenged conduct was compelled by UK law, they would have been entitled to dismissal pursuant to the foreign sovereign compulsion defence, without the need for any analysis of international comity. The majority opinion in *Hartford Fire* leaves open the question whether international comity could require a US court to consider abstaining from exercising jurisdiction in the absence of a true conflict and, if so, under what circumstances.[63]

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[59] See *Doe v. United States*, 487 U.S. 201, (1988), at p 218 note 16; *Sociètè Nationale Undustrielle Aèrospatiale v. United States District Court*, 482 U.S. 522 (1987), at pp 543-4.

[60] See *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 115 (1987).

[61] In the case Justice Scalia applied the section and the factors therein to the facts of the case and concluded these factors go against the application of US law. According to Justic Scalia, the relevant actions took place primarily in the UK, and the defendants are UK undertakings whose principal place of business was outside the US. He thought it was beyond imagination to consider that that an assertion of legislative jurisdiction by the US would be reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion; at p 819.

[62] Foreign sovereign compulsion defence calls for denial of jurisdiction by US courts in cases where an explicit law of another state compels the persons committing the anti-competitive acts to do so (who would face sanctions should they not comply). This is based on the assertion that sovereignty "includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on U.S. courts over acts of foreign sovereigns. By it terms, it prohibits only anti-competitive practices of persons and corporations". See *Interamerican Refining Corporation v. Texaco Maracaibo, Inc.*, 307 F. Suppl. (D.Del. 1970), at 1291; *Mannington Mills Inc. v. Congoleum Corp.*, 696 F.2d 1287, 1293 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of America National Trust & Savings Association*, 549 F.2d 597 (9th Cir. 1976); *US v. Watchmakers of Switzerland.*, 1963 Trade Cas. (CCH) 70,600 (S.D.N.Y. 1962). See also J. Leidig "The uncertain status of the defence of foreign sovereign compulsion: two proposals for change" (1991) 31 *Virginia J. Int'l L.* 321.

[63] J. Grifffin "Extraterritoriality in U.S. and EU antitrust enforcement" (1999) 67 *Antitrust L. J.* 159, at p 193.

The difficulty raised by this issue can also be observed in the post-*Hartford Fire* case law, which is divided on the issue of comity.[64] Some subsequent cases noted that *Hartford Fire* "did not question the propriety of the jurisdictional rule of reason or the seven comity factors in *Timberlane I*",[65] and in several cases the courts have struck out claims after finding "true conflicts" with foreign law,[66] whilst in other cases the courts refused to dismiss claims on the basis of international comity.[67]

Perhaps the most difficult question raised by *Hartford Fire* is where the case has left the US' enthusiasm for extra-territoriality in applying its antitrust laws and the principle of international comity.[68] The answer may be found in some subsequent rulings by the US courts. A good exposition is *United States v. Nippon Paper Industries, Co.*[69] The case involved a Japanese undertaking, Nippon Paper, charged by the US with conspiracy to fix prices in the US contrary to section 1 of the Sherman Act. The district court dismissed the charge and held that criminal antitrust prosecution could not extend to wholly extra-territorial conduct. On appeal, the First Circuit, reversed the district court decision, holding that the US Government could prosecute Nippon Paper for conspiring to fix prices in the US. The Court stated there was no compelling reason why principles of comity should exempt Nippon Paper from prosecution. According to the Court, a finding in Nippon Paper's favour would encourage undertakings to use nefarious means to influence markets in the US, rewarding them for erecting as many territorial firewalls as possible between cause and effect.[70]

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[64] See Lowenfeld, note 58 *Ante*.

[65] *Metro Indus. Inc. v. Sammi Corp.*, 82 F.3d 839 (9th Cir. 1996), at p 846 note 5.

[66] See *Filetech S.A.R.L. v. France Telecom*, 978 F. Supp. 464 (S.D.N.Y. 1997); *Trugman-Nash Inc. v. New Zealand Dairy Board*, 945 F. Supp. 733 (S.D.N.Y. 1997), at p 736.

[67] See, for example, *Caribbean Broad Sys. v. Cable & Wireless Plc*, 1998-2 Trade Cas (CCH) 72,209 (D.C. Cir. 1998).

[68] It has been argued that the case will encourage US Government, state attorneys general and private plaintiffs to aggressively rely on extra-territoriality. See J. Griffin "Extraterritorial application of U.S. antitrust law clarified by United States Supreme Court" (1993) 40 *Fed. B. News & J.* 564.

[69] 109 F.3d 1 (1st Cir. 1997), at pp 8-9. For a commentary on the case see A. Gluck "Preserving *per se*" (1999) 108 *Yale L. J.* 913.

[70] *Ibid.*, at 8.

It is difficult to estimate the far-reaching effect of *Nippon Paper*, especially since the Supreme Court did not give leave to the defendant undertaking to appeal. However, it may be appropriate to agree that in the light of the *Hartford Fire* case law,[71] in general, and in *Nippon Paper* in particular, US antitrust authorities have continued to be zealous in their reliance on extra-territoriality, and comity considerations appear to have had little impact on outcomes in antitrust cases.[72]

(B) The EC

1. Wood Pulp

The issue of whether EC antitrust law is capable of extra-territorial application arose in the case of *Wood Pulp*.[73] In its decision, the European Commission stated that EC antitrust law does apply extra-territorially where conduct outside the EC produces adverse economic effects within it.[74] The ECJ, on the other hand, declined to address this issue,[75] but held that Article 81(1) EC would apply where a price-fixing agreement is *implemented* within the EC.[76]

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[71] See *United States v. Cerestar Bioproducts BV*, 6 Trade Reg. Rep. (CCH) 45,098 (N.D. Cal. 1998); *United States v. Heeremac*, 6 Trade Reg. Rep. (CCH) 45, 097 (N.D. Ill. Dec. 22, 1997) (Case Nos. 4323-4324); *United States v. Hoffmann-La Roche*, 6 Trade Reg. Rep. (CCH) 45, 097, Cases Nos. 4277-8 (N.D. Cal. 1997).

[72] See Grifffin, at p 168, note 63 *Ante*.

[73] [1988] ECR 5193, [1988] 4 CMLR 474. The first occasion on which the Commission considered the question of effects was in 1964. In the case of *Grosfillex*, the Commission stated that the "territorial scope of [EC antitrust law] is determined neither by the domicile of the enterprise nor by . . . where the agreement is concluded or carried out. On the contrary, the sole and decisive criterion is whether an agreement . . . affects competition within the Common Market or is designed to have this effect". *Grosfillex-Fillistorf* [1964] 3 CMLR 237. See also Commission 11th Report on Competition Policy (1981), referring to *Grosfillex*, where the Commission stated that it "was one of the first antitrust authorities to have applied the internal effect theory to foreign companies". At p 36. See also *Aniline Dyes Cartel* [1969] 8 CMLR D23, at D33.

[74] *Ibid.*, at pp 499-500. For a general discussion of the issues here see M. Waelbroeck "Specific extra-territorial applications of jurisdiction resulting in conflict: the European Community approach" in Olmstead, note 2 *Ante*; L. Whatstein "Extraterritorial application of EU competition law-comments and reflections" (1992) 26 *Israel L. Rev.* 195.

[75] See L. Brittan *Competition Policy and Merger Control in the Single European Market* (Grotius, 1991), at pp 7-9. The ECJ avoided this question earlier in the case of *Dyestuffs*, in which the ECJ declined to accept the suggestion of Advocate General Mayers to adopt the effects doctrine, and instead asserted jurisdiction on the basis of the principle of territoriality, relying on the "economic entity" doctrine. Cases 48/69 etc. [1972] 3 *ECR* 619. See F. Mann "The *Dyestuffs* Case in the Court of Justice of the European Communities" (1973) 22 *Int'l Comp. L. Q.* 35.

[76] In contrast to what was said above about the position of the Commission, it has been argued that the ECJ remains dedicated to "an objective territoriality principle" (which requires that a foreign undertaking engage in a "consummating act" within the EC in order to extend jurisdiction) and to furthering the goal of single market integration when dealing with antitrust law cases. See Alford, at pp

2. After Wood Pulp

After *Wood Pulp*, the Commission's decisional practice seems to have been largely based on the implementation doctrine. Two cases can be mentioned as examples to illustrate. In the first case, *PVC*,[77] the Commission based its decision on the doctrine of implementation in asserting jurisdiction over a Norwegian manufacturer of PVC for allegedly participating in a price-fixing cartel. In another case, *LdPE*,[78] the Commission also employed the implementation doctrine to bring an action against several manufacturers of theroplastic low-density polyethylene for fixing prices and engaging in other forms of collusion. Interestingly however, the Commission singled out Repsol, the Spanish undertaking, because unlike the other Austrian, Finnish and Norwegian, Repsol did not implement its agreement in the EC, but rather in Spain, before the latter acceded to the EC. The Commission stated that this fact did not immunize Rapsol from legal action. Thus, according to the Commission, it was entitled to assert jurisdiction to the extent that Rapol's involvement in the cartel affected competition within the EC.[79] Hence, it may be observed that the Commission seems to have moved beyond the implementation doctrine, in this particular instance, towards an effects doctrine.[80]

More recently, in a case under the Merger Regulation 4064/89 EC, *Gencor v. Commission,*[81] the European Court of First Instance (CFI) held that the Merger Regulation was applicable to a concentration consummated in South Africa, explaining the jurisdictional criteria of the Regulation to be consistent with the judgment in *Wood Pulp*. It also considered that, as a matter of public international law, there could be no objection to the assertion of jurisdiction on the part of the

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31-7, note 18 *Ante*; J. Griffin "EC & U.S. extraterritoriality: activism & cooperation" (1994) 17 *Fordham. Int'l L. J.* 353, at pp 378-9.

[77] *The Community v. Atochem SA* [1990] 4 CMLR 345.

[78] *The Community v. Atochem SA* [1990] 4 CMLR 382.

[79] *Ibid.*, at pp 409-10.

[80] Quite interestingly, K. van Miert seems to have indicated on several occasions that in asserting jurisdiction in extra-territorial situations the Commission will make use of the "effects" doctrine. See "Analysis and guidelines on competitive policy", address at the Royal Institute of International Affairs, London (May 11, 1993); "Global forces affecting competition policy in a post-recessionary environment" (1993) 17 *World Comp.* 135.

[81] Case T-102/96 [1999] 4 CMLR 971.

Commission under the Merger Regulation in relation to a concentration outside the EC, provided that its effects within the EC would be immediate, substantial and foreseeable. The CFI stated respectively at paragraphs 90 and 98 that:

> "Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community."

"Immediate" was interpreted by the CFI to mean "medium term". This was followed by the explanation that:

> "The fact that, in a world market, other parts of the world are affected by the concentration cannot prevent the Community from exercising its control over a concentration which substantially affects competition within the Common Market by creating a dominant position."

Commenting on this judgment, Fox argued that there are several remarkable aspects about this ruling by the CFI, the most important of which seems to be that its expressed understanding of appropriate jurisdiction corresponds precisely with the US' understanding of appropriate jurisdiction (and with the US understanding of the effects test): that a state may regulate conduct that has a direct, substantial and foreseeable effect on its commerce.[82]

(C) A comment

In the EC, whilst the Commission has shown it is willing to move closer to the position of the US,[83] the ECJ has revealed a clear reluctance to endorse a US effect

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[82] E. Fox "The Merger Regulation and its territorial reach: *Gencor Ltd. v. Commission*" (1999) 20 *ECLR* 334, at p 335.

[83] See Alford, at p 29, note 18 *Ante*; C. Bellamy & G. Child *Common Market Law of Competition* (Sweet & Maxwell, 1993); K. Stockman "Foreign application of European antitrust laws" (1985) *Fordham Corp. L. Inst.* 251, at p 266; K. Messen "Antitrust jurisdiction under customary international law" (1984) 78 *Am. J. Int'l. L.* 783, at p 797; Commission 11th Report on Competition Policy (1981), at p 37; Whatstein, note 74 *Ante*; J. Bellis "International trade and the competition law of the European Economic Community" (1979) 16 *CMLRev.* 647; S. Waller *Antitrust and American Business Abroad* (Clark Beardman Callghan, 1997), ch 4.

Some writers have argued that the Commission has supplemented its integration agenda with the US notion of comity. See B. Pearce "The comity doctrine as a barrier to judicial jurisdiction: a U.S.-E.U. comparison" (1994) 30 *Stan. J. Int'l Law.* 525, at p 576.

based doctrine. The division between the ECJ and the Commission confirms that the doctrine plays a very weak role within the EC.[84]

This delay on the part of the ECJ can be explained with reference to several factors. First, the delay seems to be related to the ECJ's commitment to the goal of market integration, to which it accords primacy. Secondly, the ECJ seems to uphold that US type solutions are not necessarily sensitive to conditions within the EC.[85] Thirdly, one could argue that the ECJ has not really needed to make a finding on this matter in its case law.

Regarding international comity, the EC seems to generally respect the principle, especially regarding the OECD Recommendations on the matter.[86] As far as the Commission is concerned, it has made clear that the assertion of jurisdiction does not give way to international comity if the application of EC law: first, does not require the undertakings concerned to act in breach of their domestic laws; or secondly, does not adversely affect the important interests of a third country. In any case, according to the Commission, the interests of third countries must be so important in order to prevail over the fundamental interest of the EC in maintaining undistorted competition in the Internal Market.[87]

Unlike the Commission, the ECJ has offered a limited explanation regarding its position on international comity. Over the years, it has only occasionally touched on the issue. In the case of *IBM*, for example, in response to the argument of IBM that the Commission should have considered international comity before initiating its

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[84] See A. Himelfarb "International language of convergence: reviving antitrust dialogue between the United States and the European Union with a uniform understanding of 'extraterritoriality'" (1996) 17 *Univ. Penn. J. Int'l Econ. L.* 909, at pp 926-7.

[85] See Pierce, at p 577, note 83 *Ante*.

[86] The Recommendations state that member countries recognize "the need . . . to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation in the field of anti-competitive practices". See Revised Recommendations of the OECD Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. No. C (95) 130 (Final) (July 27, 1995).

[87] See *Aluminum Imports from Eastern Europe* OJ [1985] L-92/1, at p 14.7. In the case, the Commission seems to have implicitly recognized that in certain cases EC fundamental interest of ensuring undistorted competition has to give way to comity considerations. At p 48.

Brittan stated that the Commission considers itself obliged to have regard to comity when exercising its jurisdiction in antitrust cases involving foreign elements. See Brittan, at p 16, note 75 *Ante*.

proceedings and formulating its decisions, the ECJ held that the Commission need not do so.[88] This brevity of the ECJ in dealing with the matter can also be seen in light of *Wood Pulp*.[89]

The US, on the other hand, has not retreated from its core value of promoting extra-territoriality. For example, in the 1995 Guidelines the US antitrust authorities continued to assert jurisdiction under the effects doctrine in accordance with both *Hartford Fire* and the "direct, substantial, and reasonably foreseeable effect" test under the FTAIA. On the one hand, there seem to be some signals that the US authorities will seek to co-operate with antitrust authorities in other jurisdictions to address cross-border anti-competitive behaviour.[90] Nevertheless, the 1995 Guidelines make it clear that the possibility of a unilateral action by the US antitrust authorities is not ruled out, especially in cases where foreign states fail to take action or take inadequate action to address anti-competitive behaviour, which the US condemn within its boundaries.

Several comments are worth making on the scope of the differences and similarities between the developments on either side of the Atlantic. Perhaps the most obvious point of distinction relates to the effects and implementation doctrines.[91] Any practical

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[88] Cases 60/81R & 190/81R *IBM v. Commission* [1981] ECR 2639, at p 2655. It has been argued that as the ECJ has never rejected the effects doctrine, the Commission remains able to employ it, and might do so. See remarks by Brittan, quoted in W. Collins "The coming of age of EC competition policy" (1992) 17 *Yale J. Int'l L.* 249, at p 249. According to Griffin this even suggests that the ECJ considers international comity an issue within the Commission's discretion, at least in facts similar to *Wood Pulp*, i.e. the challenged conduct was not compelled by foreign law as the remedy does not require the undertakings to act in any way contrary to their national law. See Griffin, at pp 358-9, note 76 *Ante*.

[89] In the judgment, the ECJ devoted only one paragraph to its position regarding the application of international comity, holding that with regard to "the argument relating to disregard of international comity, it suffices to observe that it amounts to calling in question the Community's jurisdiction to apply its competition rules to conduct such as that found to exist in this case and that, as such, that argument has already been rejected". See *Woodpulp*, at p 5344.

[90] See US Department of Justice, Press Release "Justice Department closes investigation into the way AC Nielsen Co. contracts its services for tracking retail sales" (December 3, 1996), <http://www.usdoj.gov>.

[91] It may be of interest to observe in this regard the view expressed by the US Department of Justice that the "implementation" test adopted in the ECJ usually produces the same result as the US effects doctrine employed in the United States. See *Guidelines* (1995), at 20,589-8, note 5.

Against this, it has been argued that this view cannot be accepted, since the ECJ has consciously rejected the effects doctrine. See P. Torremans "Extraterritorial application of EU and U.S. competition law" (1996) 21 *ELRev.* 280; W. Van Gerven "EC jurisdiction in antitrust matters: the *Wood Pulp* judgment" (1989) *Fordham Corp. L. Inst.* 451, at pp 466-7.

importance of the distinction between anti-competitive conduct outside the EC "implemented" within it and the "effect" of such conduct is limited to a few, rare cases-such as concerted refusal to buy from, or export to, the EC or agreements to restrict non-EC production to create a scarcity outside the EC that would have the effect of raising prices within it.[92]

This preference towards limiting the areas of application of the implementation doctrine has been expressed by Alford who has argued that it was necessary for the EC to exclude certain antitrust prohibitions from its jurisdictional purview, if the implementation doctrine to remain consistent with the expressed will of the ECJ to assert jurisdiction on the basis of the territoriality principle.[93]

Still, it is not very clear which areas should be included and which should be excluded. It has been recommended that anti-competitive practices, such as the refusal to supply, should be covered under the implementation doctrine,[94] whilst others have argued that this would stretch the current jurisprudence of the ECJ. A more important issue relates to how the Commission will act in cases which are not covered under the implementation doctrine. It is of interest to see whether the Commission will remain faithful to the implementation doctrine, whether it will utilize the effects doctrine in those cases or whether it will rely on the positive comity principle as covered in the EC-US bilateral agreement.

The impact of *Hartford Fire* and *Gencor* is also important. The Supreme Court in *Hartford Fire* adopted a wide formulation of the extra-territorial scope of US antitrust law. It has been argued that in doing so, the Supreme Court has ignored the limits placed on the US' jurisdiction by public international law. Moreover, it has forgone the opportunity to place the US' approach to extra-territoriality upon the same

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In practice, the ECJ of Justice's notion of "implementation" will be sufficient to catch most agreements concluded outside the EC which seriously harm competition within it; however there may be some cases which would not be caught under the "implementation" doctrine, but would be under the "effects" doctrine: for example a boycott by non-EC undertakings not to supply raw materials to EC undertakings.

[92] Griffin, at p 187, note 63 *Ante*.

[93] Alford, at p 36, note 18 *Ante*.

[94] See T. Christoforou & D. Rockwell "European Economic Community law: the territorial scope of application of EEC antitrust law" (1989) 30 *Harv. Int'l L. J.* 195, at p 204; J. Santos "The territorial scope of Article 85 of the EEC Treaty (1989) *Fordham Corp. L. Inst.* 571, at pp 575-7.

principles as those which underpin other systems of antitrust in the world, in particular the EC system of antitrust as animated by the ECJ's jurisprudence on the topic. It is likely that this triggers a conflict between the world's two major systems of antitrust.[95] By contrast, in *Gencor*, the CFI seems to have brought the EC position on extra-territoriality closer to that of the US.

Nevertheless, a mutual liberal extra-territorial application of antitrust law between the US and the EC does not necessarily mean the elimination of all the difficulties associated with extra-territoriality. Nor does it mean that such a mutually expansive scope for the laws of one jurisdiction will be free of friction. However, taken in parallel with the above description of the extra-territorial reach of US antitrust laws, the ruling by the CFI in *Gencor* makes it clear that sooner rather than later, the question of whether an international system of antitrust is needed – albeit in limited areas, such as mergers – will have to be faced.[96]

It may be anticipated that differences between the US and the EC systems of antitrust will impact on the position of the parties, with respect to their relationship. For example, in the bilateral co-operation agreement between the EC and the US, whilst the comity rights granted in Articles V & VI of the agreement apply to both parties, it seems that the benefits to both parties will be disproportionate, since the EC's recognition of the doctrine of extra-territoriality in *Woodpulp* was virtually one-sided.

In sum, it seems that the EC and the US do not share the same conception of comity principles and extra-territoriality. Moreover, in the US the position on extra-territoriality does not seem to be entirely consistent as two different standards have been employed.[97] The first is the common law test of whether, in the light of international comity concerns, jurisdiction should be exercised on the particular facts.[98] The second is the "direct, substantial, and reasonably foreseeable" test under the FTAIA, under which the position is not clear with regards to whether comity considerations are always taken into account as an adequate substitute for the criteria

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[95] See further chapter 10.

[96] *Ibid.*

[97] See V. Sharma "Approaches to the issue of extra-territorial jurisdiction" (1995) 5 *Aus. J. Corp. L.* 45.

[98] See Alford, at p 16, note 18 *Ante.*

of "direct, substantial, and reasonably foreseeable".[99] These criteria appear to focus exclusively on establishing a sufficiently close link with the US to justify the assertion of jurisdiction, without reference to international comity.[100] The existence of different tests may cause inconsistency and lack of uniformity in how US antitrust law and policy develop.[101] On this side of the Atlantic, the Commission seems to be more willing than the ECJ to move closer to the US position on extra-territoriality. However, the EC seems to remain committed to territorial requirements, and unwilling to follow the US' version of effects doctrine and comity principles. Such differences in the position of the EC and the US exemplify the difficulties that are bound to appear in both the interaction between antitrust policy and public international law and in bringing the EC and US systems of antitrust closer together which, in turn, will have a major impact on the internationalization of antitrust policy.[102]

IV. RESPONSES TO EXTRA-TERRITORIALITY

In vigorously pursuing the extra-territorial reach of its antitrust law, the US seems to have encouraged other jurisdictions to follow suit, by adopting the "effects" doctrine under their systems of antitrust.[103] However, it has also provoked vehement responses

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[99] See B. Hawk, at p 150, note 2 *Ante*.

[100] It has been argued that the nature and intensity of the US' interest in regulating extra-territorial conduct cannot alone determine the proper limits on extra-territorial jurisdiction. See "Predictability and comity: toward common principles of extra-territorial jurisdiction (1985) 98 *Harv. L. Rev.* 1310, at 1320 (Notes section). See also Messen, at pp 784-5, note 83 *Ante*, stating that this is exactly the view of the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America* 549 F.2d 597 (9th Cir. 1976), which established that although a state may have jurisdiction whenever a sufficient number of connecting factors are present, it should nevertheless refuse to exercise jurisdiction if the regulatory interests it is pursuing are outweighed by the interests of one or more foreign states who are likely to be seriously injured by the assertion of such jurisdiction.

[101] See E. Rholl "Inconsistent application of the extraterritorial provisions of the Sherman Act: a judicial response based upon the much maligned 'effects' test" (1990) 73 *Marquette L. Rev.* 435.

[102] See further chapter 10.

[103] An OECD Report on "Restrictive business practices of multinational enterprises" (1977) concluded at para. 120 that at that time 13 systems of antitrust had embraced the effects doctrine, although it included in this list the EC system as to which the position is uncertain.

Quite interestingly, there have been calls for more reliance by the US on extra-territoriality and for the US to encourage other nations to do so. See generally Gupta, note 56 *Ante*.

from other states.[104] Over the years, the number of states which have resisted the US position on extra-territoriality within antitrust policy has increased piecemeal.[105]

A strong advocate against the US extra-territoriality has been the UK,[106] which has argued on more than one occasion that the US assertions that foreclosure of a foreign market or refusal to adopt US technical standards is sufficient to establish the requisite effect, show US antitrust law being used as a trade policy tool to open markets perceived as closed to US undertakings. This, according to the UK is an objectionable and inappropriate use of antitrust law.[107] In the EC, the Commission has noted that the accent on unilateral action by the US authorities under the 1995 Antitrust Enforcement Guidelines for International Operations in fact is contrary to on the one hand the commitment to respect comity principles and on the other hand, the efforts of the US authorities to support international co-operation.[108] For this reason, and bearing in mind the need to respond to such an assertion of extra-territoriality, several methods have been used to resist expansive extra-territoriality, which are three-fold: diplomatic protest, blocking through statutes and blocking through case law.

(A) Diplomatic protest

Diplomatic protest by foreign governments has been the most immediate reaction to US extra-territorial application of antitrust laws. Over the years, intense diplomatic dialogues, at the highest level, have occurred between Washington and no fewer than twenty other capitals in the world.[109] At the heart of diplomatic protest lies the claim

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[104] See Sandage, at p 1693, note 31.

[105] See J. Griffin " Foreign governmental reactions to U.S. assertion of extraterritorial jurisdiction" (1998) 6 *Geo. Mason L. Rev.* 505. For an account of the position of the Pacific countries *vis-à-vis* US extra-territoriality see S. Chang "Extraterritorial application of U.S. antitrust laws to other pacific countries: proposed bilateral agreements for resolving international conflicts within the pacific community" (1993) 16 *Hastings Int'l & Comp. L. Rev.* 295.

[106] See Sharma, at pp 50-2, note 97 *Ante*.

[107] Comments of the UK Government on the Antitrust Enforcement Guidelines for International Operations (1995) (December, 1994). See J. Griffin "International antitrust Guidelines send mixed message of robust enforcement and comity" (1995) 19 *World Comp.* 5.

[108] Comments of the European Commission Services (February, 1995).

[109] See Diplomatic Notes, reprinted in Lowe, note 2 *Ante*; G. Haight "Extracts from some published material on official protests, directives, prohibitions, comments, etc.", in Report of the 51st International Law Association Conference (1964), at pp 565-92; J. Davidow "Extraterritorial antitrust

that the extra-territorial application of US antitrust law adversely affects other states' interests. Nevertheless, it is not clear whether diplomatic protest, and ultimately diplomatic dialogues, can effectively help foreign states in their international antitrust conflicts with the US, especially in light of the uncertain position of comity considerations in the latter.

(B) Blocking through legislation

As a result of the unproductive nature of dialogues at the diplomatic level,[110] states have sometimes felt it necessary to strengthen their domestic legal systems to deal with what they feel is an unacceptable intrusion by the US into matters within their own jurisdictions.[111] A series of legislation was introduced in several states to thwart excessive assertions of jurisdiction by the US. The most common type of legislation states have equipped themselves with has been blocking statutes.[112] These statutes prohibit the disclosure, copying, inspection or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities.

The UK has passed two such statutes.[113] The first was the Shipping Contracts and Commercial Documents Act (1964), enacted in reaction to the US investigations of the liner conferences. The second was the Protection of Trading Interests Act (1980),

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and the concept of comity" (1981) 15 *J. W. T. L.* 500, at p 508; M. Weiner "Remedies in international transactions: a case for flexibility" (1996) 65 *Antitrust L. J.* 261.

[110] In some cases diplomatic efforts have been fruitful in the past. See J. Atwood *Antitrust and American Business Abroad* (McGraw-Hill, 1981), at pp 136-45; M. Sennett & A. Gavil "Antitrust jurisdiction, extraterritorial conduct and interest balancing" (1985) 19 *Int'l Law.* 1185, at pp 1213-4.

[111] Cases 48/69 *ICI Ltd. v. Commission* [1972] CMLR 557.

[112] These "blocking statutes" concern various issues, such as discovery of documents, enforcement of foreign judgments and prohibiting compliance with foreign court orders under different circumstances. See the Onatrio Business Records Protection Act (1947), enacted as a result of the discovery order in *In re Grand Jury Subpoena Duces Tecum* 72 F. Supp. 1013 (S.D.N.Y. 1947), the first of such legislation. See also P. Pettit & C. Styles "The international response to the extraterritorial application of United States antitrust laws" (1982) 37 *Bus. Law.* 697, at pp 707-14; A. Carroll "The extraterritorial enforcement of U.S. antitrust laws and retaliatory legislation in the United Kingdom and Australia" (1984) 13 *Denvor J. Int'l L. & Pol'y* 377.

For a good overview of these instruments see A. Lowe "Blocking extraterritorial jurisdiction: the British Protection of Trading Interests Act 1980" (1981) 75 *Am. J Int'l. L.* 257; Hermann *Conflicts of National Laws with International Business Activity: Issues of Extraterritoriality* (Howe Institute, 1982), at pp 56-68.

[113] For an overview see M. Novicoff "Blocking and clawing back in the name of public policy: the United Kingdom's protection of private economic interests against adverse foreign adjudications" (1985) 7 *Nw. J. Int'l. L. & Bus.* 12.

which came to replace the (1964) Act.[114] France introduced legislation that made it a criminal offence to communicate documents relating to commercial or technical matters for use in foreign proceedings, except pursuant to treaty or international agreement.[115] Similar statutes have also been introduced in several other states,[116] especially those with domestic undertakings involved in the uranium proceedings.[117]

(C) Blocking through case law

Blocking attempts of extra-territoriality through case law is a third method which some states have employed to resist reliance on extra-territoriality in antitrust policy by the US. In the UK, the earliest attempt made by domestic courts to prevent the extra-territorial application of US antitrust laws arose in 1952. In *British Nylon Spinners v. ICI* the Court of Appeal ordered ICI not to comply with a court order from the US, requiring ICI to re-assign certain patents to Du Pont.[118] The Court of Appeal disregarded an earlier order by Judge Ryan in *US v Imperial Chemical Industries* (ICI)[119] to dispose of industrial property abroad because it was said that this constituted an attempt to assert extra-territoriality which UK courts did not

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[114] This Statute empowers the Secretary of State to prohibit compliance with foreign measures for regulating or controlling international trade and the supply of any commercial documents or information in response to the requirements of a foreign court. See A. Huntley "The Protection of Trading Interests Act 1980: some jurisdictional aspects of enforcement of antitrust laws" (1981) 30 *Int'l. & Comp. L. Q.* 213.

[115] See Law No. 80-538 (July 16, 1980), J.O., at p 1799.

[116] For example, Australia, Canada, South Africa and New Zealand. Some of these countries re-inforced their legislation by amending them under the influence of the UK legislation. For example, Australia replaced its previous legislation with the Foreign Proceedings (Excess of Jurisdiction) Act (No.3 of 1984), and so did Canada and South Africa with the passing of the Foreign Extraterritorial Measures Act, S.C. 1984 c. 49 and the Protection of Business Amendment Act (No. 71 of 1984) respectively.

See Rosenthal & Knighton, note 2 *Ante*; Hermann, note 112 *Ante*; J. Griffin "Possible resolutions of international disputes over enforcement of U.S. antitrust law" (1982) 18 *Stan. J. Int'l L.* 279; M. Harvers "Good fences make good neighbours: a discussion of problems concerning the exercise of jurisdiction" (1983) 17 *Int'l Law.* 784; M. Joelson "International antitrust: problems and defences" (1983) 15 *Law & Pol'y Int'l Bus.* 1121; D. Sabalot "Shortening the long arm of American antitrust jurisdiction: extraterritoriality and the foreign blocking statutes" (1982) 28 *Loyola L. Rev.* 213 (includes table of different states with blocking statutes).

[117] *In re Uranium Antitrust Litigation: Westinghouse Elec. Corp. v. Rio Algom Ltd.*, 617 F. 2d, 1248 (7th Cir. 1980). See note 132 *Post.*

[118] *British Nylon Spinners Ltd. v. ICI* [1953] I Ch. 19. See O. Khan-Freund "English contracts and American antitrust law: the Nylon patent Case" (1955) 18 *M. L. R.* 65.

[119] *US v. ICI* 100 F. Supp. 504, at p 592 (S.D.N.Y. 1951).

recognize.[120] Referring to the statement in Judge Ryan's opinion that it is not an infringement of the authority of a foreign state for a US court to order harmful effects on US trade be removed,[121] the Master of the Rolls said:

> "If by that passage the learned Judge intended to say (as it seems to me that he did) that it was not an intrusion on the authority of a foreign sovereign to make directions addressed to that foreign sovereign or to its courts or to nationals of that foreign power effective to remove (as he said) 'harmful effects on the trade of the United States', I am bound to say that, as at present advised, I find myself unable to agree with it."[122]

More than twenty years later, in *Rio Tinto Zinc v Westinghouse Electric Corp*[123] a similar antithesis to the US extra-territorial approach was expressed in the House of Lords. Lord Diplock submitted that the use of the US Government of US judiciary as a means to investigate activities of UK undertakings taking place outside the US on the basis that those activities infringed US antitrust laws amounted to an unacceptable invasion of the sovereignty of the UK.[124]

(D) A comment

It is suggested that the US – and indeed any other nation seeking extra-territorial application of its antitrust law – should take the above concerns and interests of foreign nations seriously. A decision by the US to take action under its antitrust laws against anti-competitive acts beyond its national boundaries should be sensitive to any potentially negative consequences, to both relations with other nations under its foreign policy, and its efforts to promote co-operation with antitrust authorities in different jurisdictions.[125] Over the years, however, this sensitivity has not been clearly demonstrated.

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[120] *British Nylon*, at p 24.

[121] *US v. ICI* 105 F. Supp. 215 (S.D.N.Y. 1951), at p 229.

[122] *British Nylon*, at p 24.

[123] [1978] 1 All E. R. 434.

[124] *Ibid.*, at p 639. For a good discussion of this case see G. Newman "Potential havens from American jurisdiction and discovery laws in international antitrust enforcement" (1981) 33 *Univ. Fla L. Rev.* 240. See also the similar view expressed in the same case by Lord Wilberforce, that "it is axiomatic that in antitrust matters the policy of one state may be to defend what is the policy of another state to attack". At p 448.

[125] See G. Born "Recent British responses to the extraterritorial application of United States law: the *Midland Bank* decision and retaliatory legislation involving unitary taxation" (1985) 26 *Virginia J. Int'l L.* 91.

A due regard for the sovereignty and independence of other nations in matters relating to their own trade and national interest requires restraint on the part of states attempting to impose their own laws and methods of regulating economic conditions outside their own territorial boundaries. Whilst states have an absolute sovereign right to deal with acts committed within their borders which infringe their laws, such a desire to apply their laws beyond their boundaries – and even their absolute belief that their own laws and methods are ideal for all jurisdictions –[126] cannot justify an absolute assertion of extra-territorial jurisdiction over economic activities of foreign undertakings.

V. SOME REFLECTIONS

(A) Extra-territoriality as an act of aggression

When state A seeks to extend its jurisdiction over acts in state B to nationals of state B, this will normally be a breach both of the law of the latter and of international comity. Looking closely at this situation, it becomes obvious that, in effect, this is an act of aggression.[127] In antitrust policy and as far as the US is concerned, this has been an act of judicial aggression,[128] which seems to contradict a well established understanding between nations, namely that in the absence of a clear legislative intent to the contrary the courts of one state will apply and enforce the principles of public international law.[129] One such principle is that the domestic laws of an individual state cannot extend beyond its own territories, except so far as regard its own nationals. States should recognize that their jurisdictional competence is governed by this

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[126] In considering whether the US should cease attempting to impose its antitrust laws upon other peoples, President Eisenhower pledged in his Inaugural Address that in honouring "the identity and heritage of each nation of the world, we shall never use our strength to try to impress upon another people our own cherished political and economic institutions".

Obtained during a research visit to the Library of Congress, Washington D.C.

[127] See D. Wood "The impossible dream: real international antitrust" (1992) 1992 *U. Chi. Legal. F.* 277, at pp 280-1.

[128] See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950); *United States v. Imperial Chem. Indus. Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951); *Holophane Co. v. United States*, 352 U.S. 903 (1956); *United States v. Watchmakers of Switz.* Info. Ctr., Inc., 1963 Trade Cas. (CCH) 70,600 (S.D.N.Y. 1962), order modified, 1965 Trade Cas. (CCH) 71,352 (S.D.N.Y. 1965).

[129] See *The Schooner Charming Betsy*, 2 Cranch 64, 118 (U.S. 1804).

territoriality principle.[130] US courts, however, through ignorance or disregard of this principle seem to seek to address the extra-territorial behaviour of foreign undertakings over which they have obtained jurisdiction according to US rules. This is a real judicial obstacle to the internationalization of antitrust policy.

The above-mentioned US cases can be relied on in support of this view. These cases demonstrate a basic misconception regarding the competence of the courts under public international law, to proceed against foreign undertakings under their domestic laws. If a state can assume extra-territorial jurisdiction over acts by foreign undertakings because they have "consequences" within its territory and because it "reprehends" such acts, the door will definitely be opened to an almost unlimited extension of this jurisdiction. Clearly, there is a need to know where to draw the line. Therefore, examining the role of law courts seems to be the logical next step in this analysis.

(B) The role of law courts

The manner in which the US courts have applied the doctrine of extra-territoriality raises several questions with regard to the role of the judiciary in the context of extra-territoriality and international comity. First, it is not clear whether it is a proper task for the judiciary to decide such issues in this context.[131] In an area which is the juxtaposition of law and politics, it is doubtful whether judges are in the best position to assess the impact that any decision they make will have on foreign relations.[132] Furthermore, there is always the risk that this would compromise their independence. If the national legislature has not given a clear signal regarding its aim to regulate

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[130] See judgment of Lord Finlay in the *Lotus* case, at p 56.

[131] See J. Stanford "The application of the Sherman Act to conduct outside the United States: a view from abroad" (1978) 11 *Corn. Int'l L. J.* 195, at p 213 note 46.

[132] See Maier, note 28 *Ante*; D. Blair "The Canadian experience" and M. Joelson "The Department of Justice's Antitrust Guide for International Operations" in J. Griffin (ed.) *Perspectives On The Extraterritorial Application of U.S. Antitrust and Other Laws* (ABA, Section of International Law, 1979). Interestingly, some US courts have shed some doubt on the competence of the courts to handle issues of this nature. See *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979), at p 1148.

activities beyond national borders,[133] it is questionable whether courts are justified in interfering.[134]

Secondly, it seems that in practice, US courts have not been completely objective in their analysis, tending to give more weight to domestic than foreign interests.[135] Arguably, it is difficult to expect domestic courts to arrive at an impartial balance between national interests and those of other states. The balancing of these interests, as may be observed in the US, is not confined to the discipline of law as such, but seems to take place within the context of other domains,[136] including international comity. For this reason, the balancing may in some cases be a more political than legal exercise.[137] In the absence of herculean detachment, there is inevitably a risk of a "home town" decision merely by virtue of the fact that US courts have a different perspective from courts in other jurisdictions.[138] This will inevitably lead to application of the *Lex fori*.[139]

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[133] It has been argued that if the US Congress has not expressed its views on the matter, US courts in dealing with the extra-territorial scope of US antitrust law should proceed on the presumption that Congress did not intend to violate principles of international law. See generally Trentor, note 56 *Ante*.

The case of *Baker v. Carr*, 369 U.S. 186 (1962), at pp 198-200 seems to establish that a court should refrain from dealing with an action based on a federal statute unless the prohibition constituting the subject-matter of the action has been declared by Congress unlawful. See E. Craig "Extraterritorial application of the Sherman Act: the search for a jurisdictional standard" (1983) 7 *Suffolk Trans. L. J.* 295, at p 295.

[134] Lowe, at p 731, note 19 *Ante*. It is interesting to observe the attitude of the US Court of Appeals for Seventh Circuit in the *Uranium Cartel* case where the court described the foreign states, despite the encouragement of the US Department of Justice to them to submit their arguments to the US courts, as "surrogates" for absent defendants, adding that "shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction". *In re Uranium Antitrust litigation*, at p 1256.

[135] See H. Maier "Interest balancing and extra-territorial jurisdiction" (1983) 31 *Am. J. Comp. L.* 579; Lowe, note 19 *Ante*; D. Bowett "Jurisdiction: changing patterns of authority over activities and resources" (1982) 53 *Y. B. Int'l L.* 1.

[136] See generally L. Jaffe "Standing to secure judicial review: public actions" (1961) 74 *Harv. L. Rev.* 1265, at p 1304.

[137] It has been written that balancing of interest by the courts is neither appropriate nor workable because it requires balancing sensitive political and diplomatic concerns traditionally considered non-justiciable. See Sandage, at 1700, note 31 *Ante*.

[138] See generally Akehurst, at pp 185-6, note 2 *Ante*; Maier, at p 317, note 28 *Ante*.

[139] See Ehrenzweig "The *lex fori*-basic rule in the conflict of laws" (1960) 58 *Mich. L. Rev.* 637, at p 643.

Thirdly, even if courts are able to undertake such an exercise, it seems that resolving such issues should occur using inter-governmental consultation and negotiation.[140] It is difficult to expect that public international law will apply in an international antitrust issue, which is really a manifestation of a policy conflict between states. In such cases, it is more appropriate to resolve the conflict through means of consultation and negotiation. It is thought that if one state seeks to resolve the conflict in its favour by invoking its domestic antitrust law, this cannot be considered to be the rule of law but a regretable support, in judicial guise, in favour of the principle that economic might is right.[141] The view of the Court of Appeals in the case of *Laker Airways* supports this approach.[142]

Fourthly, performing this exercise of extra-territoriality within US courts can also give rise to uncertainty in law and policy,[143] in general, and for undertakings, in particular.[144] At the moment, it is extremely difficult for a foreign undertaking operating outside the US to predict whether any of its conduct may potentially give rise to liability under US antitrust law.[145] The jurisprudence of US courts in general,

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[140] Former Australian Attorney General, P. Durack, once argued that law courts should not decide on the justification of law and policy in extra-territoriality conflicts, stating that in this kind of conflicts an important matter is the question of the impact of the conflict upon foreign relations which is not justiciable, as it falls within the realm of diplomatic negotiations. See P. Durack "Extraterritorial application of U.S. antitrust law and U.S. foreign policy", address before the ABA Section Of International Law (August 12, 1981) (Library of Congress, File 1055); J. Snyder "International competition: towards a normative theory of United States antitrust law and policy" (1985) 3 *B. U. Int'l L. J.* 257; Rishkesh, at p 63, note 25 *Ante*.

[141] See Stanford, at p 213, note 46, note 131 *Ante*.

[142] *Laker Airways v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984).

[143] See J. McNeill "Extraterritorial antitrust jurisdiction: continuing the confusion in policy, law, and jurisdiction" (1998) 28 *Calif. Western Int'l L. J.* 425; J. Shenefield "Extraterritoriality in antitrust" (1983) 15 *L. & Pol'y Int'l Bus.* 1109.

Indeed, the claim can be made that the practice of the courts in the past has been confusing and contradictory. See Craig, at pp 296-7, note 133 *Ante*; J. Ongman "Be no longer chaos': constructing a normative theory of the Sherman Act's extraterritorial jurisdictional scope" (1977) 71 *Nw. U. L. Rev.* 733.

[144] See Maier, at p 317, note 28 *Ante*.

[145] In *Laker Airways*, Laker Airways rejected the jurisdictional rule of reason because it considered US courts ill-equipped to determine whether the vital national interests of the US or those of other nations should predominate, opining that balancing "generally incorporate[s] purely political factors which the court is neither qualified to evaluate comparatively nor capable of properly balancing". At pp 949-50. See also the view expressed by Turner that there "are serious doubts that courts are an appropriate forum for evaluating conflicting national and foreign interests on a case-by-case basis". At p 233, note 14 *Ante*.

and the decision of the majority in the Supreme Court in *Hartford Fire* in particular, double, if not treble, this uncertainty.[146]

Against these arguments however, stand other arguments supporting a judicial involvement in the context of extra-territoriality and comity.[147] In particular, it has been noted that analyzing comity considerations is a proper exercise for the courts and that the involvement of foreign elements or foreign relations does not *ipso facto* render the courts incompetent to deal with the matter. It has been said however, that it should not be supposed that a case touching or concerning foreign relations lies beyond judicial cognizance. US antitrust cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case and of the possible consequences of judicial action.[148]

(C) A comment

In light of the above, it seems to be appropriate to view the problem with extra-territoriality as not solely, or indeed essentially, a legal one. It is a national problem – the relation of one state with other states. Not infrequently, a state may have a genuine national interest of considerable importance in the continued existence of a cartel or another type of practice,[149] or in some state-owned or other important national undertakings not having to face large fines, not having to reveal certain information,[150] or not having to comply with a particular kind of remedy order, which may all arise as a result of extra-territorial application of other states' domestic antitrust law.[151] The involvement of a substantial national interest in this regard is

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[146] Also, note the existence of the treble damages remedy increases the dangers in US litigation, hence the enhanced risk for foreign undertakings. See pp 179-181 *Post*.

[147] See S. Burr "The application of U.S. antitrust law to foreign conduct: has *Hartford Fire* extinguished considerations of comity?" (1994) 15 *Uni. Penn. J. Int'l Bus. L.* 221.

[148] See *Baker v. Carr*, 369 U.S. 186, 211, at pp 211-2 (1962).

[149] See D. Rosenthal "What should be the agenda of a presidential commission to study the application of the international application of U.S. antitrust Law?" (1980) 2 *Nw. J. Int'l L. & Bus.* 372; Pettit & Styles, at p 699, note 112 *Ante*.

[150] D. Papakrivopoulos "The role of competition law as an international trade remedy in the context of the World Trade Organization" (1999) 23 *World Comp.* 45, at p 59.

bound to trigger problems. The fact that a state has the right to protest against the extra-territorial application of antitrust law of another state would not wither away such problems. Certain states have very strong beliefs about what they see as literally being dominated by other states, and it is irrelevant that this may arise only occasionally. This is a real psychological attitude on the part of certain states, and this must be recognized as a fact. Thus, genuine conflicts of national economic interests may arise in this context.

VI. DEALING WITH EXTRA-TERRITORIALITY AND ITS CONFLICTS

The Problem of extra-territoriality cannot be solved merely by jurisdiction or comity rules, whether judicial or of any other type. The problem is far more considerable than that. It seems that an increase in bilateral and multilateral negotiations between states in antitrust policy is required to resolve these issues.[152] Closer forms of co-operation between nations should be fostered. The situation will only deteriorate if states continue to exchange court orders and blocking statutes. The amount of animosity and friction produced by this issue can have very serious implications for relations between states and effective efforts towards co-operation between states in the internationalization of antitrust policy. This problem urgently needs to be solved in the most effective and expedient way possible.

The most desirable result, it seems, is to avoid extra-territorial application of domestic antitrust laws, provided that less harmful effective means may be found to replace extra-territoriality. In the absence of such effective means, it is suggested that alternative possible means should be found to resolve conflicts inherent in extra-territoriality in antitrust policy.[153]

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[151] See generally J. Shenefield "Thoughts on extraterritorial application of the United States antitrust laws" (1983) 52 *Fordham L. Rev.* 350.

[152] See T. Anderson "Extraterritorial application of national antitrust laws: the need for more uniform regulation" (1992) 38 *Wayne L. Rev.* 1579, at pp 1589-97.

[153] The literature on solutions suggested by scholars is abundant. See Rosenthal & Knighton, note 2 *Ante*; Shenefield, note 151 *Ante*; Davidow, note 109 *Ante*; R. Feinberg "Economic coercion and Economic sanctions: the expansion of United States extraterritorial jurisdiction" (1981) 30 *Am. U. L. Rev.* 323; Griffin, note 116 *Ante*; M. Grippando "Declining to exercise extraterritorial jurisdiction on grounds of international comity: an illegitimate extension of the judicial abstention doctrine" (1983) 23 *Virginia J. Int'l L.* 395; B. Grossfeld & P. Rogers "A shared values approach to jurisdictional conflicts in international economic law" (1983) 32 *Int'l. & Comp. L. Q.* 931; B. Hawk "International antitrust policy and the 1982 Acts: the continuing need for reassessment" (1982) 51 *Fordham L. Rev.* 201;

(A) Avoiding extra-territoriality

It seems that in most cases extra-territoriality has been employed in order to deal with anti-competitive acts committed beyond national boundaries which forecloses foreign markets.[154] If one proposes the elimination of extra-territoriality, other effective means will have to be proposed to take its place. One alternative means could be to employ trade policy to deal with such market foreclosure stemming from anti-competitive behaviour taking place beyond national boundaries. This suggestion seems to arise from the fact that domestic antitrust law falls short of providing a remedy when more than one jurisdiction is involved in the matter, especially when it comes to collecting information and evidence located in foreign jurisdiction.[155] Added to this fact, not every domestic antitrust authority can be relied upon to take effective action to protect the interests of other states and their undertakings.[156]

According to this proposal, since anti-competitive behaviour beyond national boundaries raises barriers to market access, the adequate response should be to adopt an effective trade policy as opposed to antitrust policy instruments. One such instrument would be for domestic trade agencies to undertake empirical analysis and market access evaluation into foreign market restraints. An inquiry of this kind has been suggested by some antitrust law practitioners on the other side of the Atlantic.[157]

Although very attractive, such a proposal seems to be problematic in many ways. In addition to the confusion which may be added to the roles of antitrust and trade

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Maier, note 28 *Ante*; J. Mirabito & W. Friedler "The Commission on the international application of the U.S. antitrust laws: pulling in the reins" (1982) 6 *Suffolk Trans. L. J.* 1; Rosenthal, note 149 *Ante*.

[154] See J. Farlow "Ego or equity? Examining United States extension of the Sherman Act" (1998) 11 *Transnational Law*. 175.

[155] The following chapter deals with antitrust and trade policies with respect to market access-restraining private anti-competitive behaviour.

[156] *Ibid.*

[157] Some US antitrust practitioners believe that such an inquiry could "(1) identify large markets where there are few or no imports; (2) identify where there are no exports from one major country to another; and (3) identify where persistent and dramatic price differentials exist between markets". See Report of the International Competition Policy Advisory Committee to the US Attorney General and the Assistant Attorney General for Antitrust (2000), at p 249 (*ICPAC* (2000)). Note that a similar proposal seems to have come from some undertakings. The Eastman Kodak Co. proposed during 1999 that an independent body make a finding that a restrictive practice is taking place on foreign markets and thus constitutes a hindrance to market access; this will then be used as a presumption on the part of antitrust authorities that it is necessary to initiate an enforcement action. See <http://www.kodak.com>.

policy,[158] imbuing trade agencies with the task of antitrust policy does not seem to be appropriate.[159] Apart from the lack of expertise of trade agencies in antitrust policy matters, it is likely that this would complicate antitrust policy enforcement and result in uncertainty. On the other hand, whilst it would be appropriate to recommend involving trade and antitrust policy experts in transnational antitrust policy matters,[160] it is less appropriate to suggest the exclusion of the latter. A recent report from the International Competition Policy Advisory Committee to the United States Attorney General and for the Assistant Attorney General for Antitrust (ICPAC) has argued against applying the trade methodology to practices of undertakings beyond US borders. ICPAC stated there is a risk that undertakings operating within the US and others in foreign markets will be subjected to different standards with the consequence being adverse for the latter. ICPAC also warned of the risk that applying different standards would also trigger parallel actions by other nations, something that US undertakings are very certain to contest.[161]

(B) Minimizing or avoiding conflicts of extra-territoriality

Instead of avoiding extra-territoriality in the above manner, one may advocate a closer co-operation between states in order to minimize (or better still avoid) conflicts arising as a result of extra-territoriality. The following section examines several proposals to realize that aim.

1. Taking account of the ability of foreign antitrust authorities to deal with anti-competitive acts on their territory

An antitrust authority should be encouraged to consider the ability of other antitrust authorities to deal with anti-competitive acts committed beyond its own boundaries and within the latter's jurisdiction, before it should seek extra-territorial enforcement of its own antitrust laws.[162] The authority should examine whether its concerns can be

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[158] See chapter 9.

[159] See chapter 9.

[160] See chapter 11.

[161] See *ICPAC* (2000), at p 251, note 157 *Ante*. See, however, the recent *MCIWorldcom/Sprint* case for a good example of real co-operation between the US and the EC, with the US leaving EC matters to the European Commission to handle, discussed in chapter 6.

[162] See D. Valentine "Building a co-operative framework for oversights in mergers-the answer to extraterritoriality issues in merger review" (1998) 6 *Geo. Mason L. Rev.* 525.

addressed more effectively by its counterparts in other jurisdictions. The above discussion makes it clear that the recent position adopted by the US mirrors such a proposal, albeit to a limited extent.[163] The 1995 Guidelines make it clear that the US authorities *may* consult with interested foreign nations through appropriate diplomatic channels to attempt to eliminate anti-competitive effects in the US instead of bringing their own enforcement actions.[164]

2. Reverting to extra-territoriality in the most exceptional circumstances

A second alternative could be to rely on extra-territoriality only when it is first, apparent that there is a link between the anti-competitive behaviour taking place beyond national boundaries and the commerce of a state and secondly, only in the absence of the ability of other antitrust authorities to deal with the matter themselves.[165] Thus, extra-territorial application of antitrust laws in this instance should be confined to cases in which co-operation with other antitrust authorities is not possible.

As a way of expressing respect for the interests of other states, US courts, for example, developed several devices to achieve that end. These are the Act of state doctrine, the principle of comity, the sovereign immunity and the foreign sovereign compulsion defence.[166] To this, as was said above, US courts added the jurisdictional rule of reason.

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[163] See C. Lytle "A hegemonic interpretation of extraterritorial jurisdiction in antitrust: from *American Banana* to *Hartford Fire*" (1997) 24 *Syracuse J. Int'l L. & Com.* 41, at pp 69-72.

[164] See *Guidelines*, at p 21.

[165] Note that this is an improvement on previous positions adopted by the US, under which the US applied its antitrust laws to foreign activities that had a "direct, substantial, and foreseeable" anti-competitive effect on its commerce regardless of whether the activities in question were sanctioned by other antitrust authorities or not. See *United States v. Watchmaking of Switzerland Information Centre, Inc.* 133 F. Supp. 40 (S.D.N.Y. 1955).

[166] For a good discussion of these instruments see J. Griffin "United States antitrust law and transnational transactions: an introduction" (1987) 21 *Int'l Law.* 307, at pp 327-33; P. Areeda & L. Kaplow *Antitrust Analysis: Problems Text, Cases* (Little, Brown, 1988).

Under the Act of state doctrine, US courts would refrain from questioning the legality of acts adopted by other states within their jurisdiction. This is because a "sovereign state is bound to respect the independence of every other sovereign state and the courts in one country will not sit in judgment on the acts of a government of another state done within its own territory". See *Underhill v. Hernandez* 168 US 250 (1897). See also D. Gill "Two cheers for *Timberlane*" (1980) 10 *Swiss Rev. Int'l Comp. L.* 7.

However, this proposal has limitations. It is very doubtful whether other states would accept such a proposal, even in light of the fact that extra-territoriality is being asserted in the most exceptional circumstances. Furthermore, more than one claim can be made against the adequacy of these defences introduced by US courts as way of minimizing conflicts resulting from extra-territoriality. It has been written:

> "As welcome as these methods are for the avoidance of international antitrust conflicts, they unfortunately have their limitations too. . . to force other States to regulate by compulsion is a strange objective for a state trying to reduce state interference in the private sector. Of course it is equally true to say that there is no rule of international law which demands respect for other states' policies. However, if this non-respect amounted to an intervention in, or denial of, the freedom to choose one's own socio-economic system, then there could be a violation of international law.[167]

This criticism is applicable to all the defences. Moreover, the devices are applied in a political rather than a legal context. Consequently they seem to be, in essence, discretionary "politically-oriented" devices. US courts seem to have the discretion to attach relative weights to every factor considered under each device and then weigh them against one another. To complicate matters even further, the Department of Justice has insisted that US courts should refrain from the use of comity, for example, in antitrust actions brought by US antitrust authorities. Thus, such actions should not be subject to dismissal by US courts on the basis of comity. If the Department of Justice decides to pursue an antitrust action, it amounts to determination by itself that the interests of the US should be given priority over the interests of any foreign nation and that the challenged conduct is more harmful to the US than any injury to foreign relations that might result from the antitrust action.[168] Thus, although it seems an attractive way to minimize conflicts of extra-territoriality, in practice, this "conflict of

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Under the Sovereign immunity defence, a state should not be made a defendant in US courts with regard to its political activities, as opposed to commercial activities. See *The Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). See also H. Pittney "Sovereign compulsion and international antitrust: conflicting laws and separating powers" (1987) 25 *Columbia J. Trans. L.* 403. In the US, Congress enacted the Foreign sovereign Immunities Act (1976), which gives US courts exclusive responsibility to decide when a foreign sovereign is entitled to immunity in US courts. Note that recently US Congress narrowed the immunity in 1976 by establishing that immunity does not extend to the commercial activity of foreign governments. See the Foreign Sovereign Immunities Act, 28 U.S.C. 1605(a)(2)(a) (1998).

For comments on the sovereign compulsion defence and comity see notes 62 and 33 respectively *Ante*.

[167] Rishikesh, at pp 47-8, note 25 *Ante*.

[168] *Guidelines* (1995), note 167.

laws" proposal seems to fall short of reaching the desirable end of avoiding or minimizing such conflicts.

3. Respect for principles of public international law

Greater respect for principles of international law by US courts should enable them to resolve conflicts of extra-territoriality in a more objective manner without tipping the balance in favour of national interests and national undertakings at the expense of interests of other states and foreign undertakings. Such respect therefore calls for a more careful balance of interests exercise to be undertaken by US courts.[169] Within this exercise courts should take into account interests of foreign states beyond the confines of national laws and policy goals.[170] As a result, it would be expected that fewer intrusions into the sovereignty of other states would arise and would ensure more respect for the principles of public international law, such as that of non-intervention.[171]

4. Abandoning treble damages

The first thing to be said about the treble damages remedy is that it has been unique to US antitrust law. In some jurisdictions, injured parties may bring their own legal action but only after the state in question has condemned the conduct. The existence of this type of remedy under US system of antitrust has given rise to a tension in the relationship between the US and other nations.[172] The view held by several nations has been that it is not particularly appropriate for their national undertakings to be liable in treble damages in cases before US courts, especially since actions in these cases do not infringe their own antitrust laws.

Despite this protest, the US considers treble damages remedy to be a useful means of combating domestic and foreign anti-competitive behaviour and for this reason it has

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[169] See generally Grippando, note 153 *Ante*; E. Eric "The use of interest analysis in the extraterritorial application of United States antitrust law" (1983) 16 *Corn. Int'l L. J.* 147.

[170] See the proposal suggested by some writers for the courts to substitute juridical factors of forum non conveniens for political decision-making in resolving extra-territorial antitrust cases. See Sandage, at p 1707-14, note 31 *Ante*.

[171] See the *Uranium* Case and *U.S. v General Electric Co.*, 170 F. Supp. 596 (S.D.N.Y. 1959).

[172] Report of the American Bar Association Sections of Antitrust Law and International Law and Practice on *The Internationalization of Competition Law Rules: Coordination and Convergence* (December, 1999), at pp 21-2.

emphasized that there is no consideration of abandoning this remedy. ICPAC provided several reasons for this position. First, US antitrust law makes no distinction between US and foreign defendant undertakings. Secondly, whilst removing the treble damages remedy in export restraint cases might result in fewer conflicts with the laws of other nations, it would also reward jurisdictions that have consistently been against the extra-territorial application of US antitrust laws. According to ICPAC, such an approach would result in foreign defendant undertakings gaining better treatment under US law than US defendants and could open floodgates regarding whether the offending conduct harmed "imports" commerce or "export" commerce. Thirdly, as the case record shows, a distinction between the two situations may itself be very difficult to make; most of the cases included claims involving both situations. ICPAC concluded that in spite of the potential benefits from increased co-operation from foreign authorities and undertakings, it is not advisable to alter the treble damages remedy.[173]

Regardless of how compelling this explanation is, addressing foreign restraints that may impede access to markets through private litigation is problematic. For example, though the authorities in the US have begun to consider principles of comity before applying their antitrust laws extra-territorially, there is no obligation on private undertakings to do so.

A question that is raised at present concerns whether abandoning the trebles damage remedy would be considered a positive step forward. The answer suggested by some writers has been in the positive.[174] One of the reasons why abandoning treble damages is important is that although actions brought to claim such damages seem to advance the public policies enshrined in antitrust policy, they actually represent personal interests as opposed to the public interest. These actions stand in complete contrast to

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[173] See *ICPAC* (2000), at pp 247-8, note 157 *Ante*. Further reasons for retaining the remedy are that it underpins 95% of antitrust litigation in the US and is circumscribed by the antitrust injury requirement established in certain US cases which means that plaintiffs may only recover if they suffer losses flowing from the anti-competitive act itself. Hence, for example, if there was a failing undertaking, not necessarily failing and a market leader merges with it, then another fledging undertaking could not claim treble damages for subsequent losses arising from this merger as it had not suffered any antitrust injury as such.

[174] See Rosenthal & Knighton, note 2 *Ante*, at p 88. However, other writers are not particularly optimistic about abandoning private treble damages. See J. Davidow "Treble damage actions and U.S. foreign relations: taming the 'rouge elephant'" (1985) *Fordham Corp. L. Inst.* 37.

public actions which are brought in the name of the latter's interest. Hence, private parties have no responsibility to balance a broad range of public interest on whether they should initiate an action. It is not beyond logic to even suggest that private parties may intentionally contribute to widening the difference between their own state and other states in antitrust policy in order to enhance their chances of receiving a favourable judgment. To this end, it seems that abandoning the treble damages remedy would be an effective way to minimize extra-territoriality conflicts. Nevertheless, it is difficult to force upon states the elimination of treble damages, because public international law has no scope of application with regard to the way in which a state elects to organize its own economic, legal and political orders. It can only interfere in cases of antitrust conflicts between states.

(C) Developing a common approach

Surely at this point in the development of antitrust policy internationally, at a time when more and more nations are instituting systems of antitrust with laws aimed at similar types of conduct, the judiciary in all states should acknowledge that the question of applying their domestic laws to conduct entered into outside the national territory by undertakings not located in that territory cannot be answered purely by an analysis of the national law. Just as anti-competitive conduct of foreign undertakings can have an effect in a state's territories, so too can judicial decisions in the state affect persons and conditions outside it.

Hence, though the US Supreme Court purported to take into account how the conduct in question would be regulated in the state where it took place, judges should also look at the relevant law in that state concerning extra-territorial jurisdiction in such matters.[175] This is not just to advocate an exercise in judicial reciprocity or an attempt to establish a lowest common denominator in extra-territoriality. Rather, it is to argue that the judiciary should develop common international standards and promote harmonization in the extra-territorial application of antitrust laws. This would be an appropriate exercise of comity. This would also produce positive influence on the

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[175] See J. Quinn "Sherman gets judicial authority to go global: extraterritorial jurisdictional reach of U.S. antitrust laws are expanded" (1998) 32 *J. Marshall L. Rev.* 141, at p 158.

practice of antitrust authorities, and enhance consistency in decision-making as well as confine any exercise of discretion by those authorities.[176]

As an extension to this proposal, one could also encourage nations to strive to develop multilateral standards on the effect(s) of extra-territoriality. As an alternative, bilateral agreements between nations should be welcomed, in order to ensure reciprocity and international comity. There is no doubt that the disadvantages of extra-territoriality are one reason why considerable emphasis has been put in recent years on the development of mechanisms for bilateral, regional or even global co-operation between nations in the field of antitrust policy.[177]

VII. CONCLUSION

Perhaps the main objection to extra-territoriality is that the techniques of the nineteenth century are not necessarily suitable or even sensitive to conditions and developments of the twenty-first century. Other objections seem to extend to the approaches adopted to minimize and solve conflicts arising as a result of extra-territoriality.

The above discussion makes it clear that aggressive use of extra-territoriality seems to be the primary source of tension between nations in antitrust policy. Nevertheless, there was an acknowledgement that in certain cases, extra-territoriality can be a valid basis for asserting jurisdiction, since traditional territoriality rules are inadequate to deal with acts of economic nature. In light of this, a state asserting jurisdiction extra-territorially should not do so extensively, without regard to the legal, economic and political interests of other states.

In any case, extra-territoriality, whether relied on expansively or in a limited manner, seems to have triggered various negative responses by states. In an attempt to resolve the conflicts which these responses have generated, the chapter examined several ways in which they may be avoided or minimized. An ideal situation would be to reach the stage where an international system of antitrust is effectively in place. However, this would require not only elimination of conflicts of extra-territoriality,

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[176] See chapter 4.

[177] WTO *Annual Report* (1997), at pp 31-2.

but also uprooting the latter entirely. A "second best" world would call for some action to be taken by the judiciary and domestic antitrust authorities, in order to foster harmonization and co-operation in antitrust law and policy between different states.

Finally, the chapter indicated that a great deal of extra-territoriality revolves around addressing anti-competitive conduct of domestic undertakings in one state which impedes the access of undertakings of another state to the markets of the former. This issue has quite frequently surfaced in antitrust policy debates in recent years. It is examined in the following chapter.

Chapter Nine

ANTITRUST AND TRADE POLICIES

This chapter is concerned with hindrances caused by the anti-competitive behaviour of domestic private undertakings to market access by foreign undertakings. In particular, the chapter examines the roles that antitrust and trade policies play in addressing this issue and the factors which may limit the role of either policy in this regard. The chapter considers the relationship between antitrust and trade policy, since, as will be seen, there are implications for both policies, especially in the case of hybrid practices. The purpose of the chapter however, is not to give a detailed analysis of both policies independently, but rather to examine how antitrust policy interacts with trade policy in an increasingly integrated and liberalized global economy. In so doing, the chapter evaluates the implications and lessons which one policy holds for the other.

The chapter is structured as follows. Part I gives an overview of some important points. Part II describes the different restraints which may affect the access of foreign undertakings to domestic markets. Part III deals with the differing perspectives of antitrust and trade policy. Part IV highlights the possible approaches currently available under antitrust and trade policy which can be used to address market access concerns involving anti-competitive behaviour of private undertakings. It also outlines the shortcomings of these approaches in both the short and long term. Part V advocates an alternative approach to deal with these practices. Part VI gives an account of developments in the area during the course of the last decade. Part VII contains some implications of the analysis and part VIII gives a conclusion.

I. OVERVIEW

The efforts of the international community have, for many years, been primarily concentrated on removing hindrances to the flows of trade and investment between

nations erected by states.[1] Whilst these efforts have contributed to the growth seen over the years in these flows, it seems that further growth can be achieved if hindrances caused by anti-competitive behaviour of private undertakings are completely removed.[2] This is an issue to which attention has been turning, especially since governmental hindrances have decreased in significance.[3]

The recognition that anti-competitive behaviour of private undertakings may affect the flows of trade and investment between nations that has been increasing, raises some important questions in the internationalization of antitrust policy which need to be addressed.[4] Before dealing with these questions however, it is desirable to cast some light on why restraints in general, and those caused by private undertakings in particular, are an issue of concern in the first place.

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[1] These efforts have been in the form of agreements between nations. A good example is the General Agreement on Tariffs and Trade (GATT) which has served as a tool to liberalize trade in the post 1950s era. Other efforts can be seen in the light of the events leading to the birth of the WTO. See C. Fedderson "Focusing on substantive law in international economic relations: the public morals of GATT's Article XX(a) and 'conventional rules of interpretation'" (1998) 7 *Minn. J. Global. Trade* 75, at p 79. Efforts have also taken roots at the regional level, where different states have concluded several agreements among themselves towards trade liberalization, such as the EC, NAFTA and the Asia Pacific Economic Co-operation Forum (APEC).

[2] See statement of J. Klein at the Hearings on Antitrust Enforcement Oversight, before the US House of Rep. Comm. on the Judiciary, 105th Cong., 1st Sess. (November 5, 1997), <http://www.law.house.gov>. Also, D. Wood "The internationalization of antitrust laws", address at the DePaul Law Review Symposium (February 3, 1995).

[3] See S. Waller "Can U.S. antitrust laws open international markets" (2000) 20 *Nw. J. Int'l L. & Bus.* 207, at pp 208-10; E. Fox "Foreword: mergers, market access and the Millennium" (2000) 20 *Nw. J. Int'l L. & Bus.* 203, at pp 203-4. See WTO *Annual Report* (1998). Also, WTO *Annual Report* (1997), at p 33.

Even before the WTO, the GATT recognized as early as 1960 in the decision of its contracting parties of November 18, 1960 that "business practices which restrict competition in international trade may hamper the expansion of world trade and the economic development in individual countries and thereby frustrate the benefits of tariff reductions and removal of quantitative restrictions or may otherwise interfere with the objectives of GATT".

Interestingly enough, the International Chamber of Commerce does not believe that anti-competitive behaviour of private undertakings restraining market access necessarily presents a problem in the global economy, but rather such result may be explained with reference to divergence in the international strategies of undertakings. See the ICC Joint Working Party on Competition and International Trade's replies to questions posed by the WTO Working Group (October 6, 1998), at p 2, <http://www.iccwbo.org>. Also, see p 235 *Post*.

[4] See H. Applebaum "Antitrust and the Omnibus Trade and Competitiveness Act of 1998" (1989) 58 *Antitrust L. J.* 557, at p 565; C. Ehlermann "The international dimension of competition policy" (1994) 14 *Fordham Int'l L. J.* 833, at p 839.

There are several ways in which concerns may arise. The most obvious way is when the access to domestic markets by foreign undertakings is impeded. Two important terms should be elucidated here. The first is "hindrance",[5] which in the context of the market connotes anything that makes it difficult for an undertaking to enter a particular market. Nevertheless, it may not be easy in practice to draw a clear line between what amounts to hindrance and what does not. The second term is that of "market access", which, though familiar, is a controversial issue in antitrust policy.[6] Surprising as this may be, there is no universal consensus on the meaning of "market access".[7] In the present discussion, market access is taken to connote the conditions associated with the entry of an undertakings into a particular market in order to sell goods and provide services.[8] This is not intended to be a comprehensive definition of what market access is in reality, but rather an explanation in order to facilitate a better understanding of the issues at hand.

Hindrance to market access can be caused by practices of undertakings, practices of states and in some cases practices of both – known as "hybrid" or "mixed" practices.[9]

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[5] A term that can be regarded as a synonym in antitrust policy is "barriers to entry". It may be of interest to observe the way different scholars have defined "barriers to entry". Chicago School scholars have given a very restrictive view on exclusionary practices. Bork has argued that a barrier to entry is anything that makes entry more difficult. He believes that generally barriers to entry is a misunderstood concept. See R. Bork *The Antitrust Paradox: A Policy At War With Itself* (Basic Books, 1978), ch 16. A more detailed account has been offered by Bain, whose work has done much to popularize the concept. He listed among barriers to entry such things as economy of scale, capital requirements and product differentiation, arguing that virtually any impediment to market entry should be regarded as a barrier. See J. Bain *Barriers to New Competition* (Cambridge, Harvard University Press, 1956), @ pp 114-5.

[6] It may be interesting to observe in this regard that EC antitrust law and German antitrust law focus much more than US antitrust law on conduct that tends to exclude competitors, first, because of their concern of protecting small and middle-sized undertakings and secondly, because of a perceived link between competitors access to markets and consumer interests.

[7] The International Chamber of Commerce has remarked that there is a need to expand the concept of market access to a wider conception in order to include international rules regulate business activities at a global level. See "The present and future agenda of the World Trade Organization" (April, 1996), <http://www.iccwbo.org>. See also H. Hauser "Proposal for a multilateral agreement on free market access (MAFMA)" (1991) 25 *J. W. T. L.* 77.

[8] To an extent, this definition is similar to that given by the WTO. According to the WTO, market access "describes the extent to which a good or service can compete with locally-made products in another market. In the WTO framework the term stands for the totality of government-imposed conditions under which a product may enter a country under non-discriminatory conditions". See "TAR: what is market access?", Available at <http://www.wto.org/english/thewto_e/what_is_e/eol/e/wto02/wto2_65.htm>.

[9] Several complains about private or hybrid practices have surfaced over the years. See for example claims by the American Electronics Association about restraining practices in the Japanese electronics market (Submissions to the US Trade Representative (USTR) (1991)) and complains from auto parts

If the hindrance is of the first type, one can expect it to be addressed under antitrust policy. If, on the other hand, the hindrance is of the second type, then one can expect that trade policy and its tools will become relevant. However, if the hindrance is of the third type, the position becomes less clear. In this case, one can expect there will be implications for both antitrust and trade policy. Using this division of types of hindrance, the responsibility for hindrance to market access may not always be easily apportioned between private undertakings or states. There may be cases in which the responsibility may have to be attached to both undertakings and states, since the restraints may be "mixed" or "hybrid" in nature.

II. THE DIFFERENT RESTRAINTS

(A) Private anti-competitive behaviour

1. Horizontal agreements

Horizontal agreements amongst domestic undertakings can hinder access to domestic markets by foreign undertakings if the former for example, agree to refrain from purchasing or distributing products imported by or from the latter, or to withhold from the latter materials, supplies or other necessary inputs. For example, if undertakings X, Y, and Z in state A, which enjoy a position of economic strength, decide to stop importing a specific product of state B, the consequence of this agreement may prevent those domestic undertakings handling that product in the latter state from penetrating the domestic market of the former.

2. Vertical agreements

Agreements between domestic undertakings at different levels of the economy, for example, between a supplier and a distributor may have the effect of hindering the ability of a foreign undertaking to develop a distribution network which it needs in order to access the domestic market. Normally, this is the case in exclusive distribution systems, which can substantially raise barriers to entry by foreign undertakings and exclusive purchasing agreements.

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makers in Europe and the US about similar practices in Indonesia and Korea. See <http://www.ustr.gov>.

3. Abuse of a dominant position

Hindrance to market access by foreign undertakings may occur in the case of dominant domestic undertakings which engage in abusive behaviour, such as predatory pricing designed to exclude those foreign undertakings.[10]

4. Mergers

A merger between undertakings may generate anti-competitive spillover effects beyond the borders of the state(s) where the merger is taking place. The development of a national champion undertakings through domestic mergers can harm markets beyond national boundaries, as well as hinder the ability of potential foreign undertakings to penetrate domestic markets. Alternatively, a state may raise concerns over a merger taking place in foreign markets because it wants to ensure that such a transaction does not preclude its domestic undertakings from entering those markets.[11]

(B) Practices of states

There are several ways in which practices by states may directly or indirectly impair market access by foreign undertakings.[12] The following two points illustrate how states could be held accountable for hindering market access by foreign undertakings.

1. Exemptions from antitrust law

States may directly exempt the anti-competitive behaviour of domestic undertakings from the application of their domestic antitrust laws. This issue has for many years been subjected to close scrutiny[13] but is relevant to the present discussion on the effect of practices of states on market access because exemptions from those states antitrust

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[10] Restraints can also take the form of abuse of intellectual property rights. Technology licensing arrangements that exclude licensees from a market after the life of the intellectual property right has expired can also harm the ability of undertakings to enter a foreign market. See generally S. Anderman *EC Competition Law and Intellectual Property Rights* (Oxford, 1998). The author provides an interesting account on the relationship between the issue of exclusivity and market access. *Ibid.*, at pp 250-1.

[11] See D. Baker & W. Miller "Antitrust enforcement and non-enforcement as a barrier to imports" (1996) 14 *Int'l Bus. Law*. 488, at p 490.

[12] Waller, at p 208, note 3 *Ante*.

[13] See R. Inman & D. Rubinfeld "Making sense of the antitrust state action doctrine: balancing political participation and economic efficiency in regulatory federalism" (1997) 75 *Tex. L. Rev*. 1203.

laws may have consequences beyond their domestic borders in general, and for undertakings aiming to access the market in those states in particular. The concern about exemptions in this case is a serious one, especially since there is no indication of willingness on the part of states to unilaterally confine the scope and application of exemptions from their domestic antitrust laws. The reluctance of states to abandon their existing exemptions and exclusions can be seen from the OECD Recommendations on Hard core Cartels (1998). Despite the willingness of participating states, as expressed in the Recommendations, to co-operate on enforcement action against hard core cartels, the Recommendations did not attempt to impose any disciplines on exemptions by states and instead admitted that arrangements are excluded directly or indirectly from the coverage of a participating state's domestic laws; or are authorized in accordance with such laws.[14] As a result, an extensive use of exemptions could easily lead to a substantial amount of economic activity around the world avoiding the antitrust laws of different jurisdictions.[15]

2. Strategic application of domestic antitrust law

States may indirectly strategically apply their domestic antitrust laws in order to promote "national champions" at the expense of foreign undertakings. A state may undertake strategic measures for the protection of anti-competitive behaviour of domestic undertakings because it gains more from those measures than foreign states. In a tactical application of its domestic antitrust law, a state may immunize private anti-competitive behaviour by virtue of different measures, such as the "State Action" doctrine. [16]

(C) Mixed or hybrid restraints

As outlined above, restraints on market access can be mixed or hybrid in nature. This is, for example, the case where the practices of the state facilitate the anti-competitive

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[14] See OECD web site at <http://www.oecd.org>.

[15] A study carried out by Hawk, commissioned by the OECD in 1996, found substantial exclusions from antitrust law in several sectors in 11 different jurisdictions, including employment-related activities, agriculture, energy and utilities, postal services, transport, communications, defence, financial services and media and publishing. See pp 212 *Post.*

[16] See E. Fox "The problem of state action that blesses private action that harms 'the foreigners'" in R. Zach (ed.) *Towards WTO Competition Rules: Key Issues and Comments on the WTO Report (1998) on Trade and Competition* (Kluwer Law International, 1999), at p 325.

behaviour of private undertakings.[17] The following examples may be used to illustrate.

1. Limiting foreign direct investment

One way in which a foreign undertaking may access a market is through foreign direct investment. An action by a state to give an association of undertakings in a particular domestic industry the power to decide, for example, whether or not to grant licenses to individual undertakings, can mean that the association may use this power in an exclusionary manner against foreign undertakings.

2. Standardization

Standardization in industries, by standard setting bodies especially in the hi-tech sector, such as telecommunications and information technology, can offer considerable advantages to domestic undertakings. In a global market, the activities of standard-setting bodies will have an increasing impact on the flows of trade between nations. Undertakings and consumers will seek to use technological standards that can work easily abroad. A foreign standard that is not compatible with other technologies – mainly because of the decision of the domestic standard setting body – can tilt the development of those technologies towards a domestically selected standard. As a result, the ability of a foreign undertaking, which does not have any presence in the standard-setting body, to access the domestic market may be hindered.

3. Lack of enforcement by antitrust authorities

Anti-competitive behaviour of private undertakings may also be encouraged by the lack of enforcement of antitrust policy by their domestic antitrust authorities. Such lack of enforcement may give tacit implication to those undertakings that their anti-

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[17] An example of repeated allegations of hybrid restraints may be found in the history of the Japanese passenger vehicle industry. See generally J. Rill & C. Chambers "Antitrust enforcement and non-enforcement as a barrier to import in the Japanese automobile industry" (1997) 24 *Empirica* 109.

A more recent allegation of hybrid restraint that was the subject of a proceeding under Section 301 of the US Trade Law (1974), as amended, involves an alleged government-approved concerted refusal to deal in Mexico. In 1998, the US Corn Refiners Association complained to the USTR about the practices of the Mexican government, which was alleged to have supported a restrictive agreement between the Mexican sugar producers' association and the major Mexican soft drink bottling companies. The petition claimed that the parties agreed to limit the amount of high fructose corn syrup (HFCS) they would buy. See USTR Press Release 99-44 (May 14, 1999), available at <http://www.ustr.gov>.

competitive conduct is permissible. Policy-makers in one state may even adopt a more active role by encouraging undertakings, for example to divide markets thinking that this will lead to stabilization in a domestic industry in its infancy.[18]

(D) Some remarks

In the case of hybrid restraints, anti-competitive behaviour of private undertakings may hinder market access because it may be facilitated by some supportive action by the state. The fact that this matter – mainly due to the involvement of public and private elements– cannot be addressed satisfactorily under antitrust or trade policy separately,[19] blurs the lines of accountability of states and undertakings. As a result, one can expect that economic and political tensions will materialize between states and between states and undertakings.

The involvement of a state in hybrid restraints is a matter of legal significance in their analysis under antitrust and trade policy. Interestingly however, that legal significance differs under the two policies. As far as antitrust policy is concerned, state involvement means that the behaviour of a private undertaking, which would otherwise be considered anti-competitive and possibly prohibited, may escape being caught by antitrust law.[20] Under trade policy on the other hand, such state involvement means that catching hybrid restraints is more possible.[21] Still, whereas active participation by a state in hybrid practices may be caught by trade policy, for

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[18] See generally M. Dabbah "Measuring the success of a system of competition law: a preliminary view" (2000) 21 *ECLR* 369.

[19] Current trade policy tools have not yet been tested with respect to hybrid restraints. For example the Technical Barriers to Trade (TBT) agreement at the WTO prohibits the use of standard setting for the purpose of impeding market access. As yet, however, there has not been a WTO dispute settlement panel decision under the TBT concerning this problem. See chapter 11.

[20] See generally ABA Antitrust Section, Antitrust Law Developments 1049 (1997), <http://www.abanet.org>. A good example is provided in the light of various doctrines such as, the foreign sovereign compulsion doctrine, and the foreign sovereign immunity doctrine and the Act of state doctrine. See chapter 8, notes 62 and 166.

Also, note that under US antitrust law a restrictive conduct of an undertaking may be defended on the ground that it has been authorized by a US state government as part of a clearly articulated policy to displace competition with regulation and where the state government actively supervises the conduct at issue. See *Parker v. Brown*, 317 U.S. 341 (1943) and *Southern Motor Carriers Rate Conference v. US* 471 U.S. 48 (1985).

[21] The US, for example, argued that the market access restraining practices in the *Kodak/Fuji* case were orchestrated by the Japanese government. See pp 197-9 *Post*.

example by the WTO rules, there is less certainty whether a lesser state role – such as sanctioning or tolerating the private practice – can be caught.[22]

During the last decade or so, market access-restraining hybrid practices have become a major new element in the antitrust and trade policy debate. Whilst there has been no comprehensive empirical study with economic or statistical analyses, there seems to be an increasing recognition and sufficient indication that the effect of private anti-competitive practices on trade and investment flows between nations can be as serious as public impediments.[23] Equally, there seems to be a growing recognition that the anti-competitive behaviour of private undertakings may be blessed by state actions, policies and practices.[24] Under many of these factual patterns an important question raised is whether, and to what extent, the resulting antitrust policy problems from market access-restraining hybrid practices are attributable to the state as opposed to the private undertakings concerned.

Lastly, an important comment should be made about the place of the concept of "market access" in antitrust and trade policy. Whilst the removal of artificial impediments to market access is perhaps the most obvious goal of trade policy, especially post-1945, it is not apparent that ensuring market access has been recognized as an appropriate goal for antitrust policy internationally.[25] In order to understand these differing perspectives on the place of concept of market access under both policies, one should consider their differences in general.

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[22] See how the US Congress, for example, has attempted to reach such lesser government roles through the concept of "toleration" within the meaning of Section 301 Trade Act (1974). See pp 203-5 *Post*.

[23] It is interesting to observe that at present when access to proprietary technologies or to the facilities or services offered by dominant undertakings may be essential for other undertakings, especially foreign ones, as shown with respect to Internet-related areas, both antitrust policy and trade policy seem likely to focus increasingly on private access-denying practices.

[24] US undertakings in different industries have repeatedly argued that their access to Japanese markets is hindered by the behaviour of Japanese private undertakings. See <http://www.ustr.gov>.

Hybrid market access restraints in trade in services have received particular attention in international trade negotiations. Articles VIII and IX of the General Agreement on Trade in Services (GATS) deal specifically with the obligations of Members to address the trade-restricting business practices of dominant undertakings and those which supply exclusive services as well as undertakings which offer other services.

[25] Indeed, it can be argued that this is symptomatic of the lack of vision in global antitrust policy generally.

III. THE PERSPECTIVES OF ANTITRUST AND TRADE POLICIES

Antitrust and trade policies have different perspectives.[26] First, these policies address economic distortions of different kinds and origin. Antitrust policy is primarily concerned with the conduct of private undertakings[27] and is nationally determined and is centrally focused on protecting the operation of the market.[28] Trade policy, on the other hand, is internationally determined and is principally focused on the behaviour of states, aiming to remove discriminatory acts by the latter that foreclose access to domestic markets for foreign undertakings.[29] Secondly, the legal basis of antitrust policy enforcement is wider than that of trade policy. According to Doern, this is because trade policy is decided through more political than legal processes.[30] Thirdly, trade policy has to be based on the political consent of those who are winners and losers from the expansion of trade and hence a greater weight is given to "producer interests".[31] Antitrust policy, on the other hand, tends to be more concerned with consumer interests than trade policy.[32] Fourthly, not all antitrust policy concerns are relevant to trade policy. For example, the procedural and substantive features of multi-jurisdictional merger reviews are not matters customarily considered under trade policy. In addition, international cartels appear to be a serious problem for individual states and the global economy, which provide serious antitrust policy issues but do not, directly at least, influence trade policy issues. Fifthly, when there is an

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[26] For a general comparison of antitrust and trade policy, see H. Applebaum "The Interface of the Trade Laws and the Antitrust Laws" (1998) 6 *Geo. Mason L. Rev.* 479; Also, Draft Report of the International Chamber of Commerce Joint Working Party on Competition and International Trade, "Competition and trade in the global arena: an international business perspective" (February 12, 1998). See <http://www.iccwbo.org>.

[27] Note, however, the existence of state aid rules in the antitrust policy chapter in the Treaty of Rome, such as Article 86 EC, underwhich the European Commission is able to control anti-competitive behaviour effected by governments.

[28] See R. Hudec "A WTO perspective on private anti-competitive behavior in world markets" (1999) 34 *New. Eng. L. Rev.* 79, at pp 81-2.

[29] *Ibid.*

[30] See C. Doern *Competition Policy Decision Processes in the European Community and United Kingdom* (Ottawa, 1992).

[31] See G. Feketekuty "Reflections on the interaction between trade policy and competition policy: a contribution to the development of a conceptual framework" (OECD Paris, 1993), at p 11.

[32] *Ibid.*, at p 15. See also J. Finger (ed.) *Antidumping: How It Works and Who Gets Hurt?* (University of Michigan Press, 1993); T. Boddez & M. Trebilcock *Unfinished Business: Reforming Trade Remedy Laws in North America* (Toronto: C. D. Howe Institute, 1993).

overlap in antitrust and trade policy issues, different conclusions regarding the effects of a particular restraint may be reached. Judging a restraint from an antitrust policy perspective means that its effects have to be considered in terms of efficiency and consumer welfare and other goals mentioned in chapter 3, whilst a trade policy perspective will mainly consider whether the restraint adversely impacts on the flows of trade and investment between nations and access to markets by keeping foreign undertakings out of those market. Interestingly, from a trade policy perspective, the restraint can still be condemned even if it has positive effects on efficiency and welfare of those participants in the domestic market.[33]

Although, in broad terms these differences between the two policies seem to be real, it is arguable that regarding the degree of politicization, antitrust policy "is in some ways simply politicized 'differently' rather than 'less' than trade policy".[34]

IV. THE DIFFERENT APPROACHES

This part reviews the current approaches available under antitrust and trade policies which can be adopted to deal with restraints involving the anti-competitive behaviour of private undertakings.

(A) Approaches under antitrust policy

1. Relying on extra-territoriality

If a state fails to address the anti-competitive behaviour of its domestic undertakings which hinders the entry of foreign undertakings to the domestic market, the home state of those foreign undertakings may wish to apply its antitrust law extra-territorially to open such a "domestic" market.[35] Nevertheless, the efforts of the home state may be frustrated by several factors. This is a point that has emerged from the previous chapter, which stated that extra-territorial enforcement of domestic antitrust laws may not necessarily enjoy sufficient impact to address antitrust concerns beyond

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[33] See WTO *Annual Report* (1997), at p 56.

[34] C. Doern & S. Wilks *Comparative Competition Policy* (Oxford, 1996), at p 336.

[35] The use of extra-territoriality to open foreign markets is referred to in the US as "outbound" extra-territoriality. See *US v. Pilkington plc*, 59 Fed. Reg. 30604 (1994), in which the US Department of Justice challenged restrictions imposed by Pilkington in the UK that prevented US undertakings from exporting to the UK. See further chapter 8.

domestic markets. To this, one can add the fact that reliance on the doctrine of extra-territoriality can aggravate conflicts between nations and disagreements over its application can lead to a serious friction in the interface between antitrust and trade policy.[36] To illustrate, the following hypothetical situation is used.

Suppose that state A and state B both have effective systems of antitrust. Imagine that the anti-competitive behaviour of undertaking X in state A does not harm either conditions of competition or other undertakings in the market in state A, but rather it is preventing undertaking Y of state B from penetrating that market. Of course the primary concern of state A's antitrust authority would be to protect conditions of competition, and possibly competitors, in state A's market. The fact that no harm is done to conditions of competition and competitors may lead the antitrust authority to choose not apply its domestic antitrust laws – even if harm is done to undertaking Y. However, state B's antitrust authority, being concerned about the lack of action on the part of state A's antitrust authority, may try to apply its antitrust laws extra-territorially in order to open the market in question for undertaking Y. The fact that more than one antitrust authority become involved and may reach different conclusions over one and same matter will lead to conflicts between state A and state B.

2. Bilateral co-operation between antitrust authorities

Bilateral co-operation between antitrust authorities in the enforcement of their antitrust laws may be seen as a good alternative to the extra-territoriality option. Its effectiveness as a means to address anti-competitive behaviour restraining market access of private undertakings should be seen in light of the several problems associated with that option.[37] In particular, co-operation between antitrust authorities may eliminate conflicts between states in practice and remove many problems associated with access to information and other evidentiary matters which frequently surface in antitrust law cases.[38] The benefits of co-operation should also be seen against the backdrop of the fact that undertakings will be relieved from the burden of

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[36] D. Papakrivopoulos "The role of competition law as an international trade remedy in the context of the World Trade Organization" (1999) 22 *World Comp.* 45, at p 59.

[37] See chapter 8.

[38] WTO *Annual Report* (1997), at p 31.

duplicated enforcement and inconsistent conclusions which may be reached by different antitrust authorities.[39]

In the context of practices of private undertakings restraining market access, co-operation is likely to enhance this access and promote the growth of flows of trade and investment in the global economy. This chapter identifies three different types of mechanism of bilateral co-operation between antitrust authorities.

(i) Agreements with positive comity principle

Bilateral agreements using the positive comity principle are a positive mechanism through which co-operation between antitrust authorities can be facilitated.[40] Under this mechanism, one party to the agreement (known as the requesting party) can ask the other party (known as the requested party) to address anti-competitive behaviour within the latter's boundaries that has effect on the interests of the former. A good example of such an agreement with a positive comity principle is given by the September 23, 1991 agreement between the EC and the US, which was extended by another agreement in 1998.[41]

The significance of positive comity has increased not only due to its incorporation into more formal agreements between antitrust authorities,[42] but also through the use of the principle in antitrust law cases. However, it is of considerable interest to anticipate to what extent introducing a principle of positive comity in agreements

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[39] See chapter 10.

[40] A recent report by the OECD has identified 6 potential benefits of a positive comity approach to cross-border enforcement. The benefits include improved effectiveness in remedying illegal conduct, improved efficiency in investigations, reduced need for sharing confidential and other information, avoidance of jurisdictional conflict, prevention of damage to the requested country's interests and protection for other legitimate interests of the protected country. See "Positive comity and related benefits" (May, 1999), <http://www.oecd.org>.

[41] See pp 99-101 *Ante*.

[42] For example, a co-operative enforcement agreement between Canada and the EC provides for reciprocal notification and cross-border requests for enforcement action. Under the agreement, each side is required to take the other's interests into consideration. In addition to placing a high degree of emphasis on traditional comity, the agreement provides protection for the confidentiality of information collected during the enforcement process. See <http://www.europa.eu.int/comm/dg04/intern/multilateral>. Another example is the agreement reached between the US and Israel, which provides for enforcement co-operation and co-ordination, notification of enforcement action and confidentiality protections. See the US-Israel Agreement Regarding the Application of Their Competition Laws, (March 15, 1999), available at <http://www.usdoj.gov/atr/public/international/2296.htm>.

between antitrust authorities may influence the natural tendency of those authorities not to take into account the effects of their decisions on the interests of other nations. It is desirable to suggest that the concept of comity should not be given an unduly restrictive interpretation, which would make it applicable only in cases of "pure conflict" where an undertaking cannot comply with the requirements imposed by one jurisdiction without infringing the laws of another.

(ii) De facto use of positive comity

The second mechanism of co-operation that has arisen at times resides in what can be described as the *de facto* use of positive comity. In the absence of a formal agreement with a positive comity principle between domestic antitrust authorities, it may still be possible for one antitrust authority to make a positive comity type of referral to another authority. This was exactly what the US did in the *Kodak/Fuji* case.[43]

Here, Kodak alleged that it was unable to penetrate the Japanese photographic and paper market because of hindrances caused by the Japanese authorities and Fuji Photo Film Co. In handling Kodak's claim, the US Trade Representative (USTR) lodged a complaint with the WTO, arguing that the practices of the Japanese authorities and Fuji amounted to unreasonable hindrances.[44] The USTR also referred the claims to the Japan Federal Trade Commission (JFTC). In its reference, the USTR stated that it was requesting consultations under a GATT decision concerning consultations on restrictive business practices. It also stated the US intended to discuss with Japan the significant evidence of anti-competitive activities that it had uncovered in this sector, and to ask the latter to take appropriate action.[45] The USTR confirmed the willingness

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[43] See WTO Report WT/DS44/R (98-0886) "Japan-measures affecting consumer photographic film and paper" (March 31, 1998), <http://www.wto.org/wto/ddf/ep/public.htm>.

[44] See "U.S. launches broad WTO case under GATT, GATS against Japan on film" (June, 1996), <http://www.wto.org/wto/ddf/ep/public.htm>; Office of the USTR, "Section 304 determination: barriers to access to the Japanese market for consumer photographic film and paper" (1996), <http:www.ustr.gov>. A WTO panel decided this case adversely to the US complaints. See "Japan-measures affecting consumer photographic film and paper" (31 March, 1998), <http://www.wto.org>.

See J. Ramseyer "The costs of the consensual myth: antitrust enforcement and institutional barriers to litigation in Japan" (1985) 94 *Yale L. J.* 604; J. Trachtman "International regulatory competition, externalization, and jurisdiction" (1993) 34 *Harv. J. Int'l. L.* 47, at p 54-5; H. First "selling antitrust in Japan", (1993) 7 *Antitrust* 34; W. Fugate "Antitrust aspects of U.S.-Japanese trade" (1983) 15 *Case W. Res. J. Int'l L.* 505, at p 524.

[45] Office of the USTR, Press Release, "Acting U.S. Trade Representative Charlene Barshefsky announces action on film" (June 13, 1996). See <http://www.ustr.gov>.

of the US to supply the JFTC with any necessary information that may assist the latter in its investigation. The US Department of Justice, for its part, said it was willing to assist the JFTC in its analysis of anti-competitive behaviour in the relevant market.

The JFTC looked into the complaint, but determined that Fuji's behaviour did not fall within Japanese Anti-monopoly Law. The JFTC said that access to the relevant market, including channels of distribution, was adequately available to all undertakings, whether foreign or domestic.

This outcome was not received favourably by the US, either at Government level or the level of the industry.[46] The reason for this seems to go beyond the actual outcome of the case, and involves other factors, such as the US lack of confidence in Japan's commitment to combat anti-competitive behaviour and its enforcement of its antitrust laws.[47] The fact that Japan relied on administrative guidance and informal enforcement rather than a formal decision-making process seems to be another factor, which seems to have given rise to this lack of confidence given the US commitment to the principles of transparency and due process.[48]

Recently, the US and Japan entered into a co-operation agreement for the enforcement of their antitrust laws. The agreement includes provisions on notification of enforcement and positive comity. Under this agreement, one party will inform the

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[46] See for example remarks by Senator M. DeWine, Chair of the Antitrust Sub-committee that while the US was making good progress with the EC under the positive comity agreements in place, serious problems remained with Japan. See "Senate Sub-committee focuses on international enforcement, positive comity" (May 6, 1999). See <http://www.senate.gov/~dewine>.

[47] See note 44 *Ante*.

A recent example showing lack of satisfaction on the part of the US has been in the Japanese flat glass market. Responding to US complaints about overly restrictive vertical agreements between Japanese flat glass manufacturers and wholesalers, the JFTC ruled that it could not find any violations of the Japanese Anti-Monopoly Law. Several antitrust officials in the US predicted this outcome, claiming that it was difficult to expect the JFTC to generally find against Japanese undertakings. See "JFTC sees no antitrust offence in Japanese flat glass market" (May, 1999), <http://www.usdoj.gov>.

[48] See generally, J. Haley "Administrative guidance versus formal regulation: resolving the paradox of industrial policy" and I. Hiroshi "Antitrust and industrial policy in Japan: competition and cooperation in law and trade issues of the Japanese economy" in G. Saxonhouse & K. Yamamura (eds) *Law and Trade Issues of the Japanese Economy* (University of Washington Press, 1986).

Interestingly, Japanese regulators themselves have recognized that lack of resources have created loopholes in Japan's antitrust enforcement measures. See "JFTC issues fewer warnings, but staff perceives more offences" (June, 1999), <http://www.jftc.admix.go.jp>.

other of its enforcement activities and will consult with the other on matters arising under the agreement. However, the agreement does not strictly provide for a rigorous enforcement of Japanese Anti-monopoly law. Instead, the agreement was expected to be implemented in accordance with the existing laws of each party, which means that its effect is surrounded by uncertainty.[49]

(iii) Co-operation agreements other than those with positive comity

Agreements with positive comity are not the only type of formal co-operation that exists between antitrust authorities. There are other types of agreements, such as those aiming at co-ordination of enforcement efforts through non-confidential information sharing which are likely to enhance the enforcement of antitrust policy globally. In addition, they have the potential to promote the flows of trade and investment between nations through enhancing market access.

Generally, these agreements provide that one party to the agreement should seek to take into account the important interests of the other party and notify the latter when its enforcement activities may have an impact on those important interests. This is widely known as "negative comity". Also, it is not uncommon for these agreements to provide for consultations on annual basis between the officials of the enforcement authorities concerned which may address conditions under which the parties will offer assistance to each other and may further provide that, under appropriate circumstances, the parties may agree to co-ordinate enforcement activities.

Several such agreements have been entered into by antitrust authorities over the years. As early as 1976, an agreement was entered into between the US and Germany.[50] Other agreements were entered into by the US with Australia in 1982[51] and with

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[49] See Agreement Concerning US-Japan Co-operation on Anti-competitive Activities (October 7, 1999), available at <http://www.usdoj.gov/atr/public/international/docs.htm>.

[50] Agreement Between the US and Germany Relating to Mutual Co-operation Regarding Restrictive Business Practices (June 23, 1976). *Ibid.*

[51] Agreement Between the US and Australia Relating to Co-operation on Antitrust Matters (June 29, 1982) (April 23, 1997). The agreement has been reinforced in 1999 by a mutual enforcement assistance agreement.

Canada in 1984.[52] It may be interesting to observe that these agreements seem to be reinforced by the OECD Recommendations of 1986,[53] last revised in 1995.[54]

3. A comment

The above types of co-operation are certainly helpful in promoting greater consistency in antitrust policy enforcement outcomes globally. It is also possible that such consistent outcomes may, in conjunction with continued consultation amongst domestic antitrust authorities, facilitate substantive harmonization and procedural convergence of domestic antitrust laws,[55] lead to more effective enforcement of antitrust policy globally and promote equal conditions of competition in all nations. Undoubtedly, all these factors are likely to foster the opening up of markets and growth in trade and investment.

However, these types of co-operation suffer from certain limitations, mainly relating to the exclusion of provisions on the exchange of confidential information. Antitrust authorities are unable to share confidential business information amongst themselves without the consent of the undertakings involved.[56] This inability, it has been argued, makes it impossible for antitrust authorities to adequately address cross-border anti-competitive behaviour.[57] Nevertheless, it is thought that even if this confidentiality

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[52] Memorandum of Understanding Between Canada and the US as to Notification, Consultation and Co-operation with Respect to the Application of National Antitrust Laws (March 9, 1934) (June 17, 1998). This Memorandum of Understanding was superseded in 1995 by the Agreement Between the US and Canada Regarding the Application of Their Competition and Deceptive Marketing Practices Laws (August 3, 1995) (April 23, 1997).

[53] Recommendation of the Council for Co-operation Between Member Countries in Areas of Potential Conflict Between Competition and Trade Policies, OECD Doc. C(86)65(Final) (October 23, 1986). The 1986 OECD Recommendation revised earlier versions issued on October 5, 1967 [C(567)53(Final)], July 3, 1983 [C(73)99(Final)], September 25, 1979 [C(79)154(Final)] and May 21, 1986 [C(86)44(Final)].

[54] Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anti-competitive Practices Affecting International Trade, OECD Doc. C(95)130(Final) (July 27-28, 1995).

[55] See chapter 3.

[56] See WTO *Annual Report* (1997), at p 32. See, for example, the US Antitrust Civil Process Act, the Federal Trade Commission Act and Grand Jury Secrecy Rules which contain confidentiality provisions which prohibit the antitrust authorities in the US from disclosing investigative information to all but a very limited US group of persons.

[57] In 1994, the US Congress passed the International Antitrust Enforcement Assistance Act which permits the US antitrust authorities to obtain and exchange with foreign antitrust authorities, where relevant, investigative information otherwise protected by confidentiality provisions. The Act also

limitation were removed, this would not resolve all the problems associated with these agreements because these agreements are not vehicles of conflict resolution. It seems that, although as a result of the agreements the practices of antitrust authorities are brought closer together, even with regard to rules which may originally be far apart (e.g. rules relating to vertical restraints), the agreements are unlikely to replace the need to agree on basic principles relating to their enforcement, in particular, commercial frictions may remain unresolved in the absence of a dispute settlement procedure based on a set of jointly determined antitrust rules. It is also difficult to imagine the emergence of a level playing field in global antitrust policy if this were to be founded only on a category of inevitably heterogeneous bilateral agreements.

Furthermore, the scope of these types of co-operation is constrained by differences remaining in antitrust law and its enforcement in different jurisdictions. For example, in the light of the discussion in chapter 6, it is clear that the goals of EC antitrust law do not only aim to enhance consumer welfare and efficiency of undertakings, but also to further the integration of the single market. Consequently, in the US the latter goal is neither recognized nor necessary under domestic antitrust law. Such differences are bound to lead to differences in approach between the two jurisdictions,[58] especially with respect to cases of vertical restraints and abuse of market dominance. [59]

Other limitations also arise given the inherently long-term nature of building a framework of co-operation between antitrust authorities and development of a

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provides that US authorities may open proceedings to obtain such information from nationals on behalf of foreign authorities, subject to them being satisfied that the latter will safeguard the confidentiality of the information and undertake to ensure reciprocity. In 1999, the US entered into an agreement with Australia which was based on this Act. See US Department of Justice Press Release "International enforcement to be boosted by new agreement with Australia" (April 17, 1997); D. Rosenthal "Equipping the multilateral trading system with a style and principles to increase market access" (1998) 6 *Geo. Mason L. Rev.* 543, at 568. Other, albeit more limited, agreements have been concluded by the US with other states, including Canada. The latter, for example, has been confined to criminal investigations, including criminal antitrust law cases. See A. Bingaman "U.S. antitrust policies in world trade", address before the World Trade Center Chicago Seminar on GATT After Uruguay, Chicago, Illinois (May 16, 1994), available at <http://www.usdoj.gov/atr/public/speeches/94-05-16.txt>.

[58] See chapter 10.

[59] See, for example, how the EC antitrust rules in relation to vertical restraints have been reformed, with the enactment of Regulation 2790/99 EC. See R. Whish "Regulation 2790/99: the Commission's 'new style' block exemption for vertical agreements" (2000) 37 *CMLRev.* 887. Also, with regard to market dominance, Article 82 EC jurisprudence is admittedly far more substantial than S. 2 Sherman Act case law.

globally comprehensive principle of positive comity. At present, the number of agreements with positive comity is very small. Hence, antirust authorities should be encouraged to develop a network of such agreements, particularly one that would include states other than those, which most vigorously enforce their antitrust policy today. Adopting the EC-US agreement as a model, and building on the efforts of antitrust authorities which have entered into similar agreements, seems to be the most appropriate step to take at present.

(B) Approaches under trade policy

1. Rules within the WTO

The WTO rules do not cover anti-competitive behaviour of private undertakings. Those rules are meant to address governmental practices as opposed to the practices of private undertakings. As things stand, no international rules address directly anti-competitive behaviour of private undertakings. However, the possibility of extending the scope of some WTO rules to the latter is not ruled out completely.[60] A few possibilities may be identified through which the WTO rules may address the behaviour of private undertakings. Several WTO provisions and mechanisms are of possible relevance: the consultation and co-operation arrangements under each of the main WTO agreements, the general rules of the WTO relating to non-discrimination and transparency, the areas where the WTO already provides for some minimum standards that governments are to follow in combating or regulating anti-competitive enterprise practices (notably in the area of basic telecommunications), the provisions which allow for remedies to enterprise practices, notably in the area of anti-dumping, and the WTO dispute-settlement mechanism. Furthermore, the number of areas where the multilateral trading system is already addressing antitrust policy issues has increased with the result of the Uruguay Round and the subsequent work of the WTO.[61]

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[60] The issues here regarding the role of the WTO in antitrust policy are highly controversial. See D. Papakrivopoulos, note 36 *Ante*; Report of the WTO Working Group on the Interaction between Trade and Competition policy to the General Council (December 8, 1998) WT/WGTCP/2, <http://www.wto.org>; Waller, at p 211, note 3 *Ante*; S. Waller *Antitrust and American Business Abroad* (Clark Boardman Callghan, 1997), at 18.11.

A fuller account of the role of the WTO can be found in chapter 10.

[61] WTO *Annual Report* (1997), at p 32.

The WTO could turn to each nation member to create and enforce a system dealing with private anti-competitive practices.[62] This could be in the form of general principles, such as those covered in the General Agreement on Trade in Services (GATS),[63] which the state concerned must follow. A second possibility would be for the WTO to lay down detailed substantive provisions, such as those provided in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[64] A third possibility would be to introduce a requirement to set up and maintain a procedure in the domestic legal order for private individuals to enforce their rights under domestic law.[65]

1. Domestic trade laws

The other way to reach private access-denying practices in foreign markets is using the trade laws of individual states. However, success here cannot be guaranteed better than the previous option since no domestic trade law directly reaches such practices. However, in theory at least, such practices may be reached indirectly. One example is discussed below.

(i) Case study: US Section 301, Trade Act (1974)

In the US hindrance to market access by private practices may be considered "unreasonable foreign practices" within Section 301 of the Trade Act (1974), as amended.[66]

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[62] Under the Standards Agreement, Member Governments are required to "take such reasonable measures as may be available to them to ensure that non-governmental standard-setting bodies comply with the Agreement's MFN, national treatment and other requirements". See Agreement on Technical Barriers to Trade (April 15, 1994), Marrakesh Agreement Establishing the WTO, Annex 1A, at Art. 3.1 & 8.1. The Agreement also states that as to certain of its requirements, member nations "shall formulate and implement positive measures and mechanisms in support of the observance by other than central government bodies". See Art. 3.5.

[63] See Article IX of the GATS (April 15, 1994), Marrakesh Agreement Establishing the WTO, Annex 1B. The GATS provides no definition or explanation of the "certain business practices" that "may restrain competition and thereby restrict trade". That failure, together with the absence of an explicit requirement that a trade-restricting practice be eliminated, makes this a much less useful approach to private access-denying practices than is typical of other WTO Agreements disciplining such practices.

[64] Agreement on Trade-Related Aspects of Intellectual Property Rights (April 15, 1994), Marrakesh Agreement Establishing the WTO, Annex 1C.

[65] See chapter 11.

[66] 19 U.S.C. 2411 (1974). The Act offers only limited application to governmental practices that tolerate anti-competitive private restraints. See A. Smith "Bringing down private trade barriers-an

Section 301 tackles practices or policies of foreign states that are "unfair", "unjustifiable", "unreasonable" and "burden or restrict US commerce". This includes practices or policies that are contradictory to international norms and principles, such as the principle of Most-Favoured-Nation (MFN). Practices or policies which amount to "toleration of systematic anti-competitive practices" are also considered to be unreasonable and therefore are addressed under the Section.[67] For the purposes of the Section, where the access by US undertakings to the market of a foreign state is hindered by one or more undertakings in the state behaving "systematically" in an anti-competitive manner that "burdens or restricts US commerce", then that state will be taken to have tolerated that behaviour, personally by failing to enforce its domestic antitrust laws.

In practice, however, the effectiveness of Section 301 is limited for three reasons. First, the Trade Act 1974, in general, and Section 301, in particular, do not offer any definition of the terms "toleration", "anti-competitive" or "systematic".[68] Secondly, the USTR – which is in charge of administering the Act – enjoys full discretion regarding whether or not to initiate an action in a given case.[69] Finally, a proceeding under the Section does not involve litigation, adjudication and ultimately a remedy. It is true that the Act refers to initiation of action, an investigation, a hearing and possibly trade "retaliation". But, in practice it seems that all these elements do not always feature in a Section 301 proceeding. Hence, it would be more appropriate to regard Section 301 as a medium for the USTR to negotiate with authorities in foreign states for the removal of an unfair trade practice. Even when it comes to retaliation, it seems that in the majority of cases, Section 301 proceedings lead to negotiated resolutions rather than trade retaliation. Two fundamental reasons can be identified for this view.

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assessment of the United states' unilateral options: Section 301 of the 1974 Trade Act and the extraterritorial application of U.S. antitrust law" (1994) 16 *Michigan J. Int'l L.* 241.

[67] See subsection 1(d)(3).

[68] In 1988, US trade law was brought closer to its antitrust law by making "unreasonable" practices under Section 30 also applicable to those governmental actions that constitute systematic toleration of anti-competitive activities by foreign undertakings that restrict market access. See Applebaum, at p 483, note 26 *Ante*.

[69] The use of discretion by administrative bodies and the difficulties this triggers in the internationalization of antitrust policy was discussed in chapter 4.

First, retaliation as a last resort seems to be damaging to the US petitioning industry, except for rare cases in which there is two-way trade in the product as to which market access problem exist. In those rare cases the retaliatory trade restrictions would benefit the petitioner in the US market. Apart from those rare cases however, the US industry does not gain anything from trade retaliation. In most cases, the unfair practice in the market of the foreign state which is the petitioner's problem, remains unresolved and the retaliatory action taken provides the petitioner with no offsetting benefit. Secondly, in cases where the practice is considered "unreasonable", the USTR might run the risk of violating WTO rules if retaliatory measures are taken. One can expect a foreign state to take the matter to the WTO dispute resolution in response to the retaliation. This of course involves a high degree of probability that the US will be ordered by the WTO to cease the retaliation.

(ii) A comment

It is not clear however, that the US will refrain from retaliation. For example, for eight years the Clinton administration's policy was that trade retaliation in Section 301 proceedings would be adopted in certain cases even if this would trigger a strong reaction from the WTO. There is no reason however, to believe that such certain cases will not be rare. In the *Kodak/Fuji* dispute, for example, the USTR ultimately decided not follow a Section 301 route and instead referred the complaint to the WTO with regard to the claims of government unfair practices and turned to positive comity in dealing with the private anti-competitive practices. If Section 301 type of action was not adopted in a case of private anti-competitive behaviour such as *Kodak/Fuji*, then it must be questioned whether the Section will be employed in many, indeed any, future market access disputes. Nevertheless, it will be of some interest to observe how the new Republican administration under the Presidency of George W. Bush will formulate its policies under Section 301 and the US trade and antitrust laws more generally.

V. MARKET ACCESS PRINCIPLE

The first thing that must be said is that the above options of antitrust and trade policy in terms of substance, especially the positive comity approach, may have the *potential* in the long run to be used as an effective means of combating market access-

restraining private practices. However, this does not detract from the fact that currently each option suffers from certain limitations in respect of its approach. For example, the doctrine of extra-territoriality seems to raise more concerns than it actually solves. As far as the mechanisms of co-operation between antitrust authorities are concerned, these mechanisms suffer from an inherently prolonged process of developing an adequate global framework for them. The limitations facing trade policy options on the other hand, are more obvious and primarily relate to the fact that these options do not directly address anti-competitive behaviour of private undertakings.

Yet the issue of market access-restraining private practices remains. To effectively address this concern, it is believed, requires the development of an adequate international approach to such practices in antitrust policy terms. This is an issue that goes to the heart of the internationalization of antitrust policy.[70]

(A) Using domestic antitrust laws

Most domestic antitrust authorities – specially those in the US – do not accept the view that the application of their domestic antitrust laws should consider the adverse effects on foreign undertakings or foreign economies. In the US for example, the recent focus in antitrust law on allocative efficiency and consumer welfare addresses the role of foreign undertakings (as it does for domestic undertakings) from the standpoint of their contribution to the efficiency of the marketplace.[71] To this end, there does not seem to be any consideration of whether those foreign undertakings suffer adverse effects from practices of domestic competitors.[72] This means that quite often the anti-competitive behaviour of domestic undertakings will be exonerated where, on balance, it benefits domestic consumers and enhances market efficiency. It also means broader concepts of global welfare, including harm to foreign

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[70] Fox has written that "[t]he internationalization of antitrust law has been suggested as a response to claims by United States firms that their entry and expansion into Japanese markets has been blocked by private and hybrid public/private restraints of trade". See E. Fox "Toward world antitrust and market access" (1997) 91 *Am. J. Int'l L.* 1, at p 1.

[71] See *Northern Pacific Railway v. United States*, 356 U.S. 1, 4 (1958)

[72] See *The EC Communication to the WTO Working Group on the Interaction between Trade and Competition Policy* (November 24, 1997), <http://www.wto.org>.

undertakings who are denied access to domestic markets are ignored.[73] Furthermore, whilst domestic antitrust laws at best could contribute towards the establishing of a liberal multilateral trading order, they fall short of fostering the exports of individual states.[74]

At a time of relentless globalization, this approach of domestic antitrust authorities in several countries does not seem to be suitable or satisfactory.[75] The OECD and the WTO, for example, have expressed certain reservations about this approach. A 1995 OECD report has stated:

> "As trade policy should be made much more responsive to the interests of consumers, so should competition policy probably take international considerations and the interests of both producers and consumers beyond domestic jurisdictions greater into account."[76]

The WTO has expressed a similar view:

> "Even where the criteria of allocative efficiency are solely applicable, the fact that such criteria are generally applied in respect of efficiency and welfare within the jurisdiction in question and may not take into account adverse effects on the welfare of producers and consumers abroad may lead to situations where the enforcement of national competition law will not adequately take into account the interests of trading partners."[77]

Clearly, such views of international organizations will contribute towards the internationalization of antitrust policy by shifting the focus of domestic antitrust authorities from national to global welfare and efficiencies. It is less clear, however, whether there is a prospect in the foreseeable future that this can win the support of different states and their domestic antitrust authorities, or at least the US and its antitrust authorities. Also, certain important organizations have expressed some scepticism in this regard. For example, the International Chamber of Commerce (ICC) has stated that it is not in favour of including antitrust policy on the multilateral trade agenda in the near future. The ICC has argued that the "understanding of the complex

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[73] WTO *Annual Report* (1997), at p 31.

[74] See S. Waller, at p 208, note 3.

[75] See D. Baker "Antitrust & world trade: tempest in an international teapot?" (1974) 8 *Corn. Int'l L. J.* 16.

[76] *New Dimensions of Market Access in Globalizing World Economy* (Paris, OECD, 1995), at p 254.

[77] WTO *Annual Report* (1997), at p 75.

issues involved [in trade and antitrust policy] and their ramifications has not progressed sufficiently for this subject to be included".[78]

(B) Market access principle under antitrust policy

It is submitted that market access-restraining private practices can be effectively addressed through developing a universal antitrust market access principle – as a counterpart to the market access principle under trade policy. This principle would prohibit all forms of anti-competitive impediments – including all those involving private and public elements –[79] to the ability of foreign undertakings to penetrate domestic markets. It is suggested that the principle could be initially introduced within the WTO, for the benefit of securing a wider agreement among nations on it.[80] When introduced, the principle could then be adopted in the domestic systems of different states, who would assume the responsibility of this task. States would be required to provide effective enforcement mechanisms, tools for discovery, procedural enforcement and fair process with a principle of non-discrimination and sufficient remedies to states and direct actions to undertakings within the national legal systems. The WTO would be responsible for monitoring whether states are adopting and enforcing the principle.[81]

(C) Developing the principle

1. Restraints covered

It would be over-ambitious, and possibly unrealistic, to argue that a market-access principle under antitrust policy should be adopted in the first instance regarding all types of restraints, including horizontal cartels, vertical restraints, abuses of dominance and mergers. It is suggested that the principle could be adopted first regarding certain types of restraints and then as it develops and its familiarity

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[78] See "ICC opposes inclusion of antitrust in next round of trade negotiations" (June, 1999). See <http://www.iccwbo.org>. See also p 235 *Post*.

[79] Including private and public practices avoids the difficulty associated with the existence of hybrid restraints.

[80] Note however that at present trade policy is well-developed at the WTO. Thus it is essential, as the present chapter argues, to consider divergences between trade and antitrust policies.

[81] See Communication of the Council of the European Commission, submitted by L. Brittan & K. van Miert, COM (96) 296 Final, at p 11.

increases with time, it can be extended to cover other types of restraints. For example, it seems sensible to begin with hard core cartels and mergers first, as opposed to vertical restraints and abuses of dominance. There is consensus internationally that cartels deserve immediate attention.[82] Furthermore, merger control also seems to be an issue of some urgency and importance. On the other hand, vertical restraints are an issue of some difficulty,[83] whilst abuses of dominance do not seem to be a matter of considerable need for immediate attention, since there are very few undertakings that enjoy such dominance in world markets.[84]

2. The use of Neofunctionalism

It is proposed that the development of a principle of market access under antitrust policy could be done through the use of the theory of *Neofunctionalism*. This theory has already been examined in chapter 5. The thrust of the theory revolves around the concept of spillover from one area to another.[85] The spillover in the case of developing a market-access principle in antitrust policy, it is believed, will take place in two contexts. First, there will be a spillover from trade policy (which has an effective market access principle) to antitrust policy. The suggested approach is to

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[82] See the OECD Report on Hard Core Cartels, introduced at the initiative of the US, <http://www.oecd.org/daf/clp/>. Also see the view of the EC that priority attention should be given to cartels, including export cartels. *Ibid.*, at p 9. The OECD Recommendation proposed to participants to ensure that hard core cartels are addressed effectively under their domestic antitrust laws. The Recommendation is subject however, to any exceptions and authorization contained in the laws of a participating states. Nevertheless, it does provide that derogation should be transparent and reviewed periodically to assess whether it is necessary and suitable to overriding policy objectives.

[83] This point is clear in the light of the fact that there is hardly any evidence of consistency and clarity on how should vertical restraints be approached within one and the same jurisdiction. Hence it may be appropriate to opine that the position of individual states must be first clarified and consolidated on the regulation of vertical restraints before examining the prospect of internationalization. See Fox, at p 18, note 70 *Ante*. Also, P. Marsden "The impropriety of WTO 'market access' rules on vertical restraints" (1998) 21 *World Comp.* 5.

The EC, on the other hand, has advocated a WTO market access rule that would address, *inter alia*, private vertical restraints. The European Commission has been quite explicit in supporting a rule on vertical restraints that would condemn them for access-denying effects even where, taken individually, they are not inconsistent with domestic antitrust law. It is worth noting however, that the US has been opposed to introducing this principle, especially within the WTO. See Brittan & van Miert, at p 11, note 80 *Ante*. See further chapter 11.

[84] See p 257 *Post*.

[85] Indeed, the theory seems to be receiving an increasing support. For example, scholars such as R. Kanbur have argued that in present market circumstances – the writer using globalization as an example in point – any debate on the pro and anti of globalization needs to be worked out on a sector

initially adopt a market access principle in relation to private anti-competitive behaviour. Secondly, once this is achieved, the principle could be adopted in relation to certain types of restraints, such as cartels and mergers, and then it can be expanded over time to cover other types of restraints, such as vertical agreements and abuses of dominance.

VI. DEVELOPMENTS OF SOME INTEREST

Several efforts have been made at international, regional and national levels to consider the relationship between antitrust and trade policy, which are of some interest. This section reviews the different efforts witnessed in the last decade.

(A) Work within the WTO

In 1996, due to the seriousness of market-access antitrust policy questions, a Working Group on the Interaction between Trade and Competition Policy was established within the WTO.[86] The mandate of this body, along with the Singapore Working Program set up in December 1996, reflects the close relationship between antitrust and trade policy. The efforts have been aiming at regulatory reform in order to foster markets that are more open, contestable and competitive, to the benefit of foreign and domestic undertakings alike. At the same time, a discussion of antitrust policy within the WTO also reflects the long-standing recognition that private restraints can adversely affect the benefits of negotiated trade liberalization measures, thereby reducing their benefits and potentially hindering the success that nations witnessed in removing public hindrances to the flows of trade and investment.

Over the course of the last two years, a few reports have been produced within the WTO considering the intersection of antitrust and trade policy. Of particular importance is the WTO Annual Report (1997), which contains some examination of the relationship between antitrust and trade policy and the place of antitrust policy in the multilateral trading system more generally.

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by sector basis. See R. Kanbur's recent papers, available at http://www.people.cornell.edu/pages/sk145/papers.htm.

[86] See document WT/MIN (96)/Dec., at para. 20, <http://www.wto.org>.

(B) Work within the OECD

There have been several reports by the OECD over the last ten years on the relationship between antitrust and trade policy.[87] The reports cover a wide range of topics concerning this relationship. Particular emphasis however has been placed on the consistencies and inconsistencies between the two policies. Some of these reports emphasized that differences between the two policies still remain, especially on both perspective and approach.[88] However, the reports have failed to identify how much differences between the two policies hinder the operation of one or the other policy.

Remarkably, the reports – despite realizing the existence of important differences between the two policies – have reached the important conclusion that the two policies are broadly compatible. It has been said that the two policies are complementary with basically the same goals: free trade and free competition are mutually supportive.[89]

As far as the issue of market access is concerned, some of the reports – especially the Hawk report which was produced on behalf of the Trade Committee and the Competition Law and Policy Committee –[90] explained how market access is related to the enforcement of domestic antitrust rules. For example, the report argued that strengthening domestic antitrust laws in this respect would help minimize or alleviate trade policy disputes arising as a result of market access-restraining private anti-competitive behavoiur. The report noted that this also would help reduce the need for extra-territoriality.

During the last two years, particular attention at the OECD has been paid to pursuing the following "desirable and complementary" future options in building global antitrust policy: enhanced voluntary convergence in domestic antitrust laws; enhanced

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[87] Over the years, the OECD established some important programmes. See for example the *Report on Competition and Trade Policy: Their Interaction* which was produced in 1984 by the Committee of Experts on Restrictive Business Practices. The Report examined the possible approaches to developing an improved international framework for dealing with problems arising at the frontier of antitrust and trade policy. See <http://www.oecd.org>.

[88] See *Consistencies and Inconsistencies Between Trade and Competition Policies* (OECD, 1999).

[89] See *Trade and Competition policy for Tomorrow* (OECD, 1999).

[90] See *Antitrust and Market Access* (OECD, 1996).

bilateral co-operation between antitrust authorities; fostering regional agreements containing antitrust policy provisions; building plurilateral antitrust policy agreements and moving towards multilateral antitrust policy agreements.[91] These recent initiatives are important because, *inter alia*, they seek to engage non-member countries, academics and representatives of the business community. The initiatives are also important because they are *inter-disciplinary* in nature.[92]

(C) Work within the US Department of Justice, Antitrust Division

The International Competition Policy Advisory Committee (ICPAC) was formed in November 1997 by former US Attorney General, J. Reno, and former Assistant Attorney General for Antirust, J. Klein, to examine what new tools and concepts are needed to address antitrust policy issues that are appearing on the horizon in the global economy. Part of ICPAC's efforts were devoted to the interface between antitrust and trade policies. A report was produced by ICPAC in February 2000 which covered a wide range of issues. It is beyond the scope of the present chapter to give an account of all these issues.

As far as antitrust and trade policies are concerned, ICPAC evaluated the current approaches to these practices. It concluded that no particular approach is appropriate to respond to all antitrust policy problems in the global economy, but without giving a particular set of proposals. It is argued that this is not satisfactory, and that there is a need for such a set of proposals.[93]

(D) Work within the American Bar Association

In January 2000, the Antitrust and International Trade Sections Task Force of the American Bar Association produced a joint report concerning private anti-competitive practices as market access barriers. The report urged governments to take action against private anti-competitive practices that restrain market access by foreign undertakings in ways that substantially distorts competition in the markets within an individual state's jurisdiction. The task force did not suggest that states agree on the details of substantive antitrust law or procedure. Instead, it recommended that states

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[91] See *Report on International Options to Improve the Coherence Between Trade and Competition Policies* (OECD, 2000).

[92] See *Trade and Competition Policy: Exploring the Way Forward* (OECD, 1999).

take actions consistent with the principles of national treatment and Most-Favoured-Nation treatment, as well as provide a fair, transparent process, accessible to foreign undertakings where complaints can be made of access-denying practices and a resolution will be reached within a reasonable period of time. The ABA took no position as to what, if any, dispute resolution mechanism should be established to deal with the situation where one state is aggrieved by another state's failure to take action against foreclosure by a private practice that substantially lessens competition. Also, the report did not offer a view on the appropriate role of the WTO.

VII. IMPLICATIONS OF THE ANALYSIS

Artificial barriers leading to market foreclosure cause trade tensions. Where entry to markets is restricted by a private act, rather than a public act, which amount to antitrust violation then antitrust policy will be available – but not necessarily so – to dispel the tension. Yet, there are cases in which the restraint is not only implemented by undertakings. For example, a state may elect not to enforce its antitrust policy against market-access restraining private anti-competitive behaviour, which means that trade tensions may be triggered between nations as a result. In such a case, the problem of market-access is not an easy one since it is hybrid in nature.

(A) Substitutability of antitrust and trade policies

The above discussion illustrates how, at present, antitrust and trade policy approaches fall short of addressing hybrid restraints in general, and private restraints in particular, affecting market access. However, the discussion did not address the question of whether, in this case, one policy can be a substitute for the other. Of course, if trade policy can obviate the need for antitrust policy regarding impediments to market access involving, or arising as a result of, private anti-competitive behaviour, then there would be no need to consider the adoption of the market access principle under antitrust policy, or under any other principle.

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[93] See chapter 11.

1. Using trade policy instead of antitrust policy

However, it is possible to be sceptical about the claim in favour of trade policy rendering antitrust policy unnecessary, even if this result is achievable.[94] This is because while a free trade stance greatly reduces the scope of the task facing antitrust authorities, it does not imply that antitrust law and policy have no purpose to serve. Free trade must be complemented by the freedom of entry, including the possibility to contest markets, in particular through foreign direct investment, especially in the services sector and as far as products confined to domestic markets are concerned.[95]

This view is in line with another on the potential role of antitrust policy in addressing private restraints that may arise in international trade. One of the driving forces of globalization is liberalization of trade and investment. Removing barriers to trade and investment does not necessarily ensure access to markets. As undertakings attempt to improve or maintain their competitive position in an increasingly more global environment, they may take actions aimed at effectively keeping foreign competitors out of their domestic market. While the dividing line between meeting competition and restricting it by hindering access can admittedly be a fine one, it nonetheless emphasizes the potential contribution of antitrust policy to addressing problems of access and presence encountered by foreign undertakings.[96]

The conclusion to be drawn from the above discussion is that there is a need for antitrust policy in the global economy, and that the existence of trade policy does not affect this conclusion.

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[94] See chapter 8.

[95] B. Hoekman & P. Mavroidis "Linking competition and trade policies in Central and East European Countries", Policy Research Working Paper 1346, (The World Bank, Washington, D.C., 1994), at p 3; W. Shughart, J. Silverman & R. Tollison "Antitrust enforcement and foreign competition" in F. McChesney & W. Shughart (eds.) *The Causes and Consequences of Antitrust: The Public Choice Perspective* (Chicago, 1995), at p 180.

The Joint Progress Report on Trade and Competition Policies submitted by the Committee on Competition Law and Policy and the Trade Committee at the 1993 Ministerial Meeting of the OECD argued that globalization was expected to lead to more efficient production and marketing, lower prices and improved product quality and variety, but that it will "fail to do so unless market access and competition can be preserved and enhanced". At p 2. See also M. Trebilcock "Reconciling competition laws and trade policies: a new challenge to international co-operation" in Doern & Wilks, at p 270, note 34 *Ante*.

[96] A.B. Zampetti & P. Sauve "New dimensions of market access: an overview" (OECD, Paris 1995), at p 19. See also WTO *Annual Report* (1997), at p 32.

2. Using antitrust policy instead of trade policy

The flip-side of this debate relates to whether antitrust policy obviates the need for trade policy, especially in the case of hybrid practices, and if so, what form antitrust policy should take in a liberal trade policy environment and moreover in a global economy. Of course, whilst trade policy tools remove public impediments to competition from foreign undertakings, such tools do not tackle private restrictions on competition within domestic markets, including competition from foreign undertakings.[97] In this way, inadequately framed or enforced domestic antitrust policy – to the extent that it permits anti-competitive behaviour which precludes effective market access or an effective market presence by foreign undertakings – may be an impediment to foreign competition and the flows of trade and investment between nations.

Using antitrust policy to combat private anti-competitive practices affecting international trade may be desirable. Nevertheless, its effectiveness as a remedy in this instance gives rise to several concerns. First, there is little awareness of the nature of similarities or differences between antitrust and trade policies with regard to market access.[98] Secondly, it is not clear whether a commonly understood antitrust rule which is applicable to market access-restraining practices exists. Thirdly, there is a risk that nations may drawn in deep market access disputes of an antitrust nature. Nations do not often seem to have confidence in the ability of the institutions of one another to resolve such disputes, something that is likely to trigger differences between nations over dispute resolution.[99]

These concerns are mainly related to the scope and goals of antitrust law.[100] It was argued above that domestic antitrust law may be limited by the existence of

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[97] The WTO's web site is rich with information on submissions by nations on this matter to the WTO Working Group on the Interaction Between Trade and Competition Policy. See <http://www.wto.org>.

[98] See the different documents produced by the OECD, pp 210-212 *Ante*.

[99] E. Fox "Competition law and the agenda for the WTO: forging the links of competition and trade" (1995) 4 *Pac. Rim L. & Policy J.* 1, at 15.

[100] See WTO *Annual Report* (1997), at pp 46-8.

exemptions.[101] A particular example of how exemptions can diminish the effectiveness of domestic antitrust law to address trade policy issues is the case of export cartels, for which all major trading nations provide some form of exemption.[102]

The scope of domestic antitrust law can also be limited in terms of its enforcement. The importance of the issue of enforcement may be observed in three different contexts. First, the extent to which foreign undertakings can have a private right of action to enforce the domestic antitrust laws of the host-state.[103] Secondly, the extent to which domestic authorities responsible for the enforcement of antitrust policy will act in cases where foreign interests are involved.[104] Thirdly – and this is a point that arises due to the political nature of trade policy – the extent to which domestic antitrust authorities are immune from political pressures. The effectiveness of domestic antitrust law in resolving trade policy issues will depend upon the independence of domestic antitrust authorities. Ensuring adequate independence of these is likely to encourage and enable them to initiate and deal with cases involving alleged anti-competitive practices that adversely affecting foreign interests.[105]

Regarding the goals of antitrust law, reference should be made here to chapter 3, which contains a detailed discussion of this topic.[106] Proceeding from that discussion, it is clear that domestic antitrust laws in different jurisdictions serve different goals. In the US, the main objective of antitrust law generally accepted is economic efficiency

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[101] See pp 188-9 *Ante*.

[102] See U. Immenga "Export cartels and voluntary export restraints between trade and competition policy" (1995) 4 *Pac. Rim. L. & Pol'y J.* 93, at pp 96-107. Also, WTO *Annual Report* (1997), at p 20.

[103] The position here rests on two factors: first, whether the relevant domestic system of antitrust provides for private actions generally and secondly, whether relevant undertakings have *locus standi* to institute actions in the host state if they are neither incorporated nor have other legal presence therein. See chapter 11.

[104] The scope of national antitrust policy to respond to trade concerns of foreign nations can be limited by a possible non-enforcement. This issue triggers formidable difficulties, especially since enforcement of antitrust policy falls within the discretion of national antitrust authorities. See further chapters 4 and 10.

[105] See p 50-1 *Ante*.

[106] See pp 38-45 *Ante*.

and consumer welfare. In the EC, on the other hand, other goals have equal status such as furthering market integration.[107]

It seems that economic goals of efficiency and consumer welfare are regarded as more favourable to the use of antitrust law as a trade remedy, than those relating to fairness and political concepts.[108] This is because the former goals are neutral, whilst the latter goals might be used to support domestic undertakings to the detriment of foreign undertakings and consumers. Wider political goals are likely to undermine the role of antitrust law and policy as an effective means to combat market access-restraining practices.

(B) Consistencies and inconsistencies between the policies

One caveat however is that even if economic efficiency and consumer welfare are recognized as appropriate goals of antitrust policy, it is not certain that antitrust and trade policies will coincide with how concerns relating to market access should be handled.[109] Nevertheless, if there was a disagreement between the two policies, then it can be regarded as one of perspective rather than of principle, which can be justified by the traditional roles of both policies and the tension associated with them.[110] Antitrust and trade policies are compatible as far as concerns relating to market access are concerned.[111] The aim of both policies is to improve the efficient allocation of resources. Trade policy contributes to efficiency by removing barriers that impede the ability of foreign undertakings to access new markets. Antitrust policy contributes to

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[107] See V. Korah *An Introductory Guide to EC Competition Law and Practice* (Sweet & Maxwell, 1994). See also chapter 6.

[108] The first recital of the WTO Agreement sets out the objectives of the multilateral trading system. Reference in the recital to "raising standards of living" and "optimal use of the world's resources in accordance with the objectives of sustainable development" seems to indicate that promoting efficiency and welfare in a global economy are among such objectives".

[109] The point can be explained here with reference to the way in which vertical restraints are addressed under antitrust policy. See Marsden, at pp 9-10, note 82 *Ante*. The author observed in the same context that this is not a problem, if the issue is considered from a shared perspective, antitrust and trade policy. *Ibid*., at p 10.

[110] Trebilcock, at p 269, note 88 *Ante*.

[111] This can be seen in the context of the free movement and free competition provisions in the EC, where the two have always been considered complementary in achieving the goals of the EC including promoting a continuous, harmonious and balanced development of economic activities throughout the single market.

efficiency by preventing undertakings from harming competition.[112] Under antitrust policy analysis, however, foreign or domestic competitors may be excluded from a market, so long as competition is not thereby harmed. In these cases, the objective of both policies is met and an efficient outcome is achieved.[113]

The above discussion also indicated the extent to which anti-competitive or exclusionary practices restrict access to markets around the world and whether this is a problem which demands the immediate attention of policy-makers of the international community. It was argued that this type of restriction is a serious one, especially in the case of hybrid restraints. These restraints make the distinction between the application of antitrust and trade policies quite difficult to draw. Trade policy is sufficiently developed on the international plane, particularly within the auspices of the WTO. Antitrust policy, by way of contrast, is significantly less developed on the international plane. However, the need for international developments in this regard has been advocated throughout this thesis because this is where the central challenge facing the antitrust communities of nations lies.

Over the years, the interest in the intersection between antitrust and trade policies has grown, mainly due to the growing integration and expansion of the world economy. This development has revealed that anti-competitive behaviour of private undertakings increasingly may have wide cross-border dimensions. Furthermore, with the rise in flows of trade and investment in the global economy, foreign undertakings are concerned with whether domestic antitrust laws are fit and apt for addressing the anti-competitive behaviour of domestic undertakings which hinders their entry to domestic markets.

At present, antitrust policy remains primarily national in outlook and there are neither rules which enforceable on the international plane nor an international enforcement agency to enforce such rules. However, antitrust policy is addressed indirectly, albeit in limited aspects, in the main agreements that make up the WTO. Outside the WTO, consultation and co-operation on anti-competitive restraints are facilitated through a number of bilateral, regional and multilateral mechanisms and frameworks, such as

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[112] See generally Dabbah, note 18 *Ante*.

[113] Marsden, at p 9, note 82 *Ante*.

the EC, NAFTA, ANCESTRA, UNCTAD, the World Bank and the OECD.[114] For example, the OECD has adopted a series of recommendations and guidelines addressing anti-competitive behaviour of private undertakings. However, compliance with the majority of these rules is on a voluntary basis and so they are not legally binding.[115]

(C) Market access principle

In the absence of international antitrust rules, this chapter has proposed an effective application of antitrust policy through the development of a market access principle. It was seen that from a trade policy point view, this is desirable. A nation that has undertaken trade liberalization measures has every interest in ensuring that the welfare and efficiency benefits arising from such measures are not lost due to anti-competitive practices by undertakings. Avoiding the nullification or impairment of trade liberalization commitments, as a result of such practices, is also a matter of legitimate concern for members of the global trading family. Antitrust law and policy do not normally have specific trade objectives, such as promoting market access. However, in pursuing the goals of promoting economic efficiency and consumer welfare, an effective application of antitrust law is essential for tackling barriers to entry set up by undertakings in the market or other anti-competitive practices which affect both foreign and domestic undertakings.

Furthermore, adopting a market access principle under antitrust policy would not only lead to a growth in the flows of trade and investment, but also provide more consistency in the application of antitrust policy tools as a complement to trade policy. This can then be followed by the fostering of international co-operation, which seems to be desirable from a trade policy perspective: it seem that all nations would benefit from the effective application of antitrust law to anti-competitive practices which hinder access to markets. The substantial removal of hindrances to the flows of trade and investment between nations erected by states has greatly contributed to enhanced conditions of competition. At the same time, in the absence of an effective antitrust law framework undertakings may have an incentive to engage in anti-competitive behaviour with a view to protect the domestic market against

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[114] See WTO *Annual Report* (1997).

foreign competition. The risk of conflicts of jurisdiction arising from the application of the antitrust laws of nations can also have repercussions for the global trading system. The scope for such conflicts is the greater if antitrust authorities pursue trade policy goals by seeking to apply domestic antitrust law to anti-competitive practices affecting exports and which do not have a substantial impact on the domestic market.[116] There is also a risk that, in the absence of effective remedial action in the antitrust field, pressure could grow for the unilateral use of trade sanctions or of such bilateral trade agreements that may run counter to the principles adhered to by the global trading family. Clearly the sensible thing to do in these instances would be for a nation to apply its domestic antitrust law to practices which are both contrary to domestic welfare and the legitimate interests of other nations. Enhanced international co-operation in the antitrust field would therefore lead to significant gains from both the antitrust and trade policy perspective.

(D) Antitrust policy at the WTO

The dominant form of co-operation between antitrust authorities has taken the form of bilateral agreements. The inclusion of several important provisions, such as the principle of positive comity, have considerable potential for reducing the scope for conflict using close co-operation between antitrust authorities with the shared objective of protecting competition, including cases where foreign interests are involved. However, despite the actual and potential benefits of this form of co-operation, there is an increasing awareness of the need for an additional role by a multilateral framework. The WTO can be seen as a suitable forum for this task.[117] First, unlike other existing international organizations with actual or potential agenda for antitrust policy, the WTO comprises developing and developed states. Secondly, it is capable of combining the establishment of binding disciplines with the flexibility required to take into account differences in antitrust law and practice and the particular concern of developing states.[118] The possible development of such

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[115] *Ibid.*

[116] See chapter 8.

[117] However, note the US resistance to pursuing antitrust policy programmes within the WTO generally. See further chapter 10.

[118] See chapters 10 and 11.

multilateral framework using the WTO could substantially develop a market access principle under antitrust policy and complement trade policy tools as well as contribute towards the achievement of the objectives of global economy. The WTO has argued that any stance on antitrust law or enforcement, including the decision not to have a antitrust law at all, or not to enforce the existing law, is a policy choice. This implies that it is often difficult to separate out private restraints from public policy, since the fact that the private restraints exist might be attributable to the government's choice not to interfere, or not to apply laws under which it could intervene.[119]

VIII. CONCLUSION

Foreclosure of domestic markets by restraints can involve private anti-competitive behaviour. This can be in the case of pure private restraints or in the case of hybrid restraints. In the former, antitrust policy tools are obviously relevant. However, it is not clear to what extent these tools currently deployed to effectively address such restraints. The case of hybrid restraints on the other hand, is a more difficult one because they involve issues of both antitrust and trade policy. It was argued that neither policy tool at present is a good fit to address the concerns arising from these restraints. Hence, the chapter proposed the development of an alternative approach to deal with hybrid restraints in general, and private restraints in particular. This, advocated the internationalization of antitrust policy. The discussion concentrated on a particular aspect of the debate, namely the adoption of a market access principle under antitrust policy.

Whilst acknowledging that the WTO rules do not regulate the behaviour of private undertakings, the chapter suggested adopting the principle within the WTO. Indeed, the question should not be raised with regard to whether the WTO should or should not address private restraints. Rather the fundamental question that seem to arise concerns the extent to which nations are willing to establish a global framework within antitrust policy in order to further trade liberalization objectives. This particular aspect of the debate is examined in the following chapter, which gives a broader comparative overview of the internationalization of antitrust policy.

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[119] See WTO *Annual Report* (1997).

Chapter Ten

PAST, PRESENT AND FUTURE: A COMPARATIVE ANALYSIS

This chapter brings together the different strands of past, present and some possible future developments of the internationalization of antitrust policy. The chapter is structured as follows. Part I looks at past developments. Part II constructs an institutional framework of the capabilities of international organizations to pursue global antitrust policy. Part III attempts to link present developments with the type of internationalization of antitrust policy, which seems to be emerging on the horizon. Part IV deals with the issue of political power and the interests of business and the state. Part V gives an account of various model systems of antitrust. Part VI examines the EC-US conflict in the internationalization of antitrust policy. Part VII sheds some light on the issue of convergence and harmonization of antitrust law and policy of different nations. Part VIII considers some substantive issues.

I. SOME IMPORTANT PAST DEVELOPMENTS

To help to understand where the internationalization of antitrust policy should go, it is important to examine its past experience first.

The first quarter of the twentieth Century witnessed some general antipathy towards anti-competitive practices. This antipathy, which can be seen from the way the League of Nations considered international cartels as "an enemy of world trade", was given a stronger impact in the early 1930s. During those years, cartels were employed by several nations, notably Germany, Italy and Japan, as a means for mobilizing for what became World War II. In an attempt to address international cartels and in general anti-competitive practices, the Draft Havana Charter was introduced. The Draft Charter aimed to, *inter alia*, establish an International Trade Organization (ITO)

and introduce provisions dealing with restrictive business practices.[1] The Draft Charter imposed an obligation on member nations of the proposed ITO to prevent undertakings from engaging in activities, which may "restrain competition, limit access to markets or foster monopolistic control in international trade" where these restraints interfered with the trade liberalizing aims of the Charter.[2] The Charter stated that members could bring complaints about such restraints to the ITO. The latter would then be entitled, under Article 48 of the Charter, to investigate and recommend action to the home states of the undertakings engaged in restrictive practices. However, due to US objection to this effort towards internationalization of antitrust policy, the ITO never actually materialized and the Charter was deemed to fail.[3] This result may be considered to be surprising, particularly in light of the US' hostility at that time towards restrictive practices,[4] which can be seen from the following letter addressed to former Secretary of State, Cordell Hull by former President Franklin Roosevelt:

> "During the past half century the United States has developed a tradition in opposition to private monopolies. The Sherman and Calyton Acts have become as much part of the American way of life as the due process clause of the Constitution. By protecting the consumer against monopoly these statutes guarantee him the benefits of competition.
>
> This policy goes hand in glove with the liberal principles of international trade for which you have stood through many years of public service. The trade agreement program has as its objective the elimination of barriers to the free flow of trade in international commerce; the antitrust statutes aim at the elimination of monopolistic restraints of trade in interstate and foreign commerce.
>
> Unfortunately, a number of foreign countries, particularly in continental Europe, do not possess such a tradition against cartels. On the contrary, cartels have received encouragement from some of these governments. Especially is this true with respect to Germany. Moreover, cartels were utilized by the Nazis as governmental instrumentalities to achieve political ends. The history of the use of the I.G. Farben trust by the Nazis reads like a detective story. The defeat of the Nazi armies will have to be followed by the eradication of these weapons of economic welfare. But more than the elimination of the political activities of German cartels will be required. Cartels practices which restrict the flow of goods in foreign commerce will have to be curbed. With international trade involved this end can be achieved only through collaborative action by the United Nations.

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[1] See Havana Charter for an International Trade Organization, UN Doc. E/Conf. 2/78 (1948). Printed in C. Wilcox *A Charter for World Trade* (Macmillan, 1949). See also P. Muchlinski *Multinational Enterprises and the Law* (Blackwell, 1995), at p 403.

[2] *Ibid.*, Article 46.

[3] See A. Lowenfeld *Public Controls on International Trade* (Matthew Bender, 1983).

[4] See T. Arnold *Bottlenecks of Business* (Reyal & Hichcock, 1973); C. Edwards *Control of Cartels and Monopolies: An International Comparison* (Oceana Publications, 1967), at pp 228-30; I. Bruce & E. Clubb *United States Foreign Trade Law* (Boston: Little, Brown, 1991).

> I hope that you will keep your eye on this whole subject of international cartels because we are approaching the time when discussions will almost certainly arise between us and other nations."[5]

Five years after the unsuccessful attempt of the Havana Charter, the United Nations Economic and Social Council (ECOSOC) recommended the inclusion of a draft convention that would have established a new international agency endowed with the responsibility to receive and investigate complaints of restrictive business practices. However, the US rejected the draft convention because it felt that disparities in domestic policies and practices were so substantial that they would render an international organization ineffective.[6] The US also was not in favour of the "one state, one vote" provision. According to the US, such a provision would afford inimical states the chance to abuse this provision.

Little progress was made in the global antitrust policy scene until 1958, when a GATT Experts Group made some recommendations that practices of private undertakings should be excluded from dispute settlement review. It was thought that the absence of consensus and experience in this policy made it particularly difficult – and quite unrealistic – to try to reach any form of multilateral agreement on how to deal with restrictive business practices with international components.[7] The group also stated that more internationalization needed domestic antitrust laws and antitrust institutions. This was followed by a 1961 report in which the GATT recommended that parties to a dispute should engage in consultation with each other on the control of restrictive business practices.[8]

II. INSTITUTIONAL FRAMEWORK

The second half of the twentieth century saw an increase in the number of nations around the world which have instituted systems of antitrust. However, it is obvious

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[5] Obtained by the writer during a research visit to the Franklin Roosevelt Library, New York, File 277. See also Muchlinski, at p 387, note 1 *Ante*.

[6] D. Wood "The impossible dream: real international antitrust" (1992) *U. Chi. Legal F.* 277, at pp 284-5.

[7] GATT Resolution (November 5, 1958) cited in D. Furnish "A transnational approach to restrictive business practices" (1970) 4 *Int'l Law.* 317, at p 328. See also M. Janow "Competition policy and the WTO" in J. Bhagwati & M. Hirsh (eds.) *The Uruguay Round and Beyond* (University of Michigan Press, 1998).

that differences still exist in experience with antitrust law and policy, as well as in the way that internationalization thereof is conceived amongst those nations. Until now, the international antitrust policy scene has not witnessed the conclusion of binding international agreements on antitrust law policy.[9] Instead, a variety of consultative mechanisms have been instituted.[10]

Despite this, it seems that the internationalization of antitrust policy has gained renewed impetus and those in favour of internationalization have not lost hope in pushing the project forward.[11] New or expanded international efforts must however be structured in a flexible manner to recognize remaining differences between nations. In light of this, the following discussion looks first at the institutional capabilities of existing international organizations. This will be complemented by the discussion in the following part, which considers the views of different interest groups with regard to the appropriate role of those organizations in antitrust policy.

(A) The WTO

The WTO is a unique international organization and rule-making body, partly because of its wide membership base, which includes 135 developing and developed states, partly due to the availability of professional staff and partly because of its centrality as a forum for negotiating binding rules governing the economic conduct of states.[12] This uniqueness has been further enhanced with the increase of areas for convergence introduced in the Uruguay Round of multilateral trade negotiations as well as by its improved dispute settlement mechanisms.

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[8] GATT Resolution, BISD 28 (9th Supp., 1961).

[9] A. Fiebig "A role for the WTO in international merger control" (2000) 20 *Nw. J. Int'l L. & Bus.* 233, at p 244.

[10] See generally S. Waller "The internationalization of antitrust enforcement" (1997) 77 *B. U. L. Rev.* 343.

[11] See E. Fox "International antitrust: cosmopolitan principles for an open world" (1998) *Fordham Corp. L. Inst.* 271; J. Halverson "Harmonization and coordination of international merger procedures" (1991) 60 *Antitrust L. J.* 531; E. Petersmann "International competition rules for the GATT-MTO world trade and legal system" (1993) 27 *J. W. T. L.* 35; Fiebig, at p 233, note 9 *Ante*.

[12] Fiebig, at p 247, note 9 *Ante*.

Like the GATT, the WTO deals principally with trade-distorting acts of governments. Thus, the WTO rules, except those on anti-dumping, have not been focused on the behaviour of private undertakings. Instead, the WTO has adopted a comprehensive set of rules obliging member governments to observe common non-discrimination principles and market-opening commitments included in different schedules.

Prior to the WTO, several GATT cases had come to light where states claimed that other states supported or fostered restrictive practices by undertakings that foreclose access to markets. Neither the GATT nor the WTO has been a primary forum for resolving such disputes. Furthermore, save in circumstances such as those mentioned in chapter 9 and at the beginning on the present chapter, international trade rules have not held governments accountable for the actions of private undertakings. In this way, the WTO does not hold a multilateral set of rules that make governments responsible for market access restraining practices of undertakings. Nevertheless, the WTO cannot be seen as lacking the features necessary to achieve antitrust policy objectives.[13] Indeed, the basic non-discrimination principles of national treatment, Most-Favoured-Nation treatment, and transparency that underpin the WTO also support the operation of impartial systems of antitrust.[14] Furthermore, a domestic policy framework that ensures that private undertakings do not, through private arrangements, restrict the flow of trade and investment that nations worked hard towards achieving is equally important to support the international trading system. In these ways, the two policy frameworks are complementary.[15] In addition, antitrust policy concepts appear in several WTO agreements such as: the Basic Telecommunications Agreement,[16] the General Agreement on Trade in Services,[17]

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[13] See P. Nicoliades "For a world competition authority" (1996) 30 *J. W. T. L.* 131; M. Matsushita "Reflections on competition policy/law in the framework of the WTO" (1997) *Fordham Corp. L. Inst.* 31; F. Weiss "From world trade law to world competition law" (2000) 23 *Fordham Int'l L. J.* 250; E. Petermann "Proposals for negotiating international competition rules in the GATT-WTO world trade and legal system" (1994) 49 *Aussenwirtschaft* 231; P. Marsden "'Antitrust' at the WTO" (1998) 13 *Antitrust* 28; H. Arai "Global competition policy as a basis for borderless market economy" (July 22, 1999), address, available at <http://www.miti.go.jp/topic-e/eWTO0997e.html.>.

[14] See chapter 11.

[15] See H. Applebaum "The coexistence of antitrust law and trade law with antitrust policy" (1988) 9 *Cardozo L. Rev.* 1169; Petersmann, note 11 *Ante.*

[16] See Section 1.1 of the Fourth Protocol to the General Agreement on Trade in Services.

[17] See Articles VIII, IX and Article IX:2.

Agreement on Trade-Related Investment Measures,[18] Trade-Related Aspects of Intellectual Property Rights[19] and the Accounting Disciplines Agreements.

(B) The OECD

1. General

The OECD has been playing a leading role in looking at the internationalization of antitrust policy.[20] Through this role, the OECD has become not only an important consultative body for nations with systems of antitrust, but also a source of technical assistance to many nations introducing or aiming to introduce antitrust law and policy in their domestic legal systems.[21] In particular, the OECD has been helpful to national judges in such nations who are keen on developing their decisional mechanisms in antitrust cases.

At a more substantive level, the OECD has issued non-binding recommendations, such as a recommendation in 1986,[22] another in 1995 on international co-operation amongst domestic antitrust authorities and most recently in 1998 a recommendation condemning hard core cartels.[23]

The OECD has been particularly active in encouraging soft convergence amongst member nations. The OECD consists of most, if not all, of the world's developed states, and as such one can expect that greater substantive convergence in antitrust policy matters could contribute towards building global antitrust policy. Despite the

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[18] See Article 9.

[19] See for example Article 41 of the TRIPS.

[20] In 1976 the Guidelines for Multinational Enterprises as revised were adopted which deal with a variety of antitrust policy issues. See also OECD Declaration on International Investment and Multinational Enterprises (June 21, 1976).

[21] For a fuller description of the OECD's activities in antitrust policy, see P. Lloyd & K. Vautier *Promoting Competition in Global Markets: A Multi-National Approach* (Elgar, 1999), at pp 131-8.

[22] Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies [C(86)65(final)], printed in OECD, Competition Policy and International Trade (OECD Instruments of Co-operation, 1987), at pp 24-7. The Recommendation encouraged participating states not to distort competition through abusing unfair trade laws, take into account the effect of export/import restrictions on competition and trading partners when considering approval of such restrictions, ensure that their procedures are transparent and notify other states of anti-competitive behavior of their domestic undertakings.

[23] See <http://www.oecd.org>.

OECD's contributions in this regard, it still suffers from certain institutional limitations which constrain its ability to play a more expansive role in developing a global approach to antitrust policy. Moreover, many non-member nations regard the organization as one for more developed countries. More recently, the failure of the negotiations on a Multilateral Agreement on Investment (MAI) at the OECD may have put its ability to serve as a forum for negotiating international antitrust agreements in doubt. Notwithstanding these limitations, the OECD certainly enjoys strong experience in a wide range of antitrust and trade policy issues. Its contributions remain important and currently it is involved in designing joint antitrust projects with other international organizations, such as the World Bank.[24]

2. Committees

Several OECD committees are engaged in programmes dealing with antitrust policy. Two of these are worth mentioning.

(i) The Competition Law and Policy Committee (CLP)

The CLP consists of representatives from domestic antitrust authorities of the 29 OECD members.[25] The aim of the CLP is primarily to promote common understanding and co-operation among antitrust authorities.[26] This is carried out through meetings of officials of domestic antitrust authorities which have contributed towards facilitating greater convergence between the antitrust laws of the nations concerned. Through publishing regular reports and holding discussion groups, the CLP has been offering the OECD family an opportunity to bring their understanding of antitrust policy principles closer together.

(ii) The Joint Group on Trade and Competition (JGTC)

The JGTC has pursued a different strategy from the CLP. In particular, it has focused on fostering the understanding of member nations on issues relevant to the interface

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[24] More, up-to-date information is available at <http://www.worldbank.org> and <http://www.oecd.org>.

[25] Known pre-1987 as the Committee of Experts on Restrictive Business Practices. The CERBP was established by the Organization for European Economic Cooperation (OEEC) in 1953.

[26] See <http://www.oecd.org/daf/clp/COMMTE.htm>.

between antitrust and trade policy. To this end, it has published several reports,[27] which deal mainly with legal and regulatory exemptions under existing domestic antitrust laws and the relationship between the two policies. The JGTC has also facilitated meetings between antitrust enforcers trade and policy-makers to develop a common understanding about the framework for addressing matters of interest to both antitrust and trade policy communities.

(C) UNCTAD Restrictive Business Practices Code

In 1973, the United Nations Conference on Trade and Development (UNCTAD) began negotiations on the control of restrictive business practices[28] at the instigation of developing states. Eight years later, the United Nations General Assembly adopted UNCTAD's Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices.[29] The Code aims to ensure favourable treatment towards developing states by offering them protection from the restrictive business practices of multinational undertakings.[30] It provides that states should improve and enforce their laws on restrictive business practices, and that they should consult and co-operate with competent authorities of states adversely affected by restrictive business practices. It also requires multinational undertakings to respect the domestic laws on restrictive business practices of the states in which they operate. Despite being an important step forward, the Code is voluntary, is not binding, and has not been recognized as a source of public international law. Moreover, UNCTAD has yet to evolve into a dynamic body for the treatment of antitrust policy issues.

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[27] See pp 210-12 *Ante*.

[28] The negotiations took place within three different groups: Group B, made of industrialized states; Group D, comprising principally socialist states; and Group of 77, containing developing and less developed states.

[29] See Muchlinski, at pp 403-11, note 1 *Ante*.

[30] See also Draft UNCTAD Transfer of Technology Code, proposed by developing countries in the 1970s to address exploitative practices in licensing patents, technology and other intellectual property by multinational undertakings of developing countries domestic undertakings. The proposal however did not go beyond negotiations stage because of three main issues: first, whether to adopt a rule of reason on the qualification of prohibited restrictive practices, secondly, whether to exempt restrictions in agreements between affiliated undertakings, at least where they do not impose anti-competitive harm on unaffiliated undertakings, and thirdly, whether to allow justification of export restraints. See E. Fox "Harnessing the multinational corporation to enhance 3rd world development-the rise and fall and future of antitrust as a regulator" (1989) 10 *Cardozo. L. Rev.* 1981, at pp 1992-6.

III. FROM PRESENT TO THE FUTURE

An important question confronting the antitrust communities of nations at present concerns what the next step should be, especially at the WTO, in the area of internationalization of antitrust policy. The relevance of this question seems to be growing in light of attempts to initiate another round of multilateral trade negotiations. Thus, there is a question with regard to whether in the short-term antitrust policy should become part of any multilateral trade negotiations between nations. Any view in favour of including antitrust policy issues must be clear on what should be considered in those negotiations: a set of rules subject to dispute settlement procedures, frameworks for transparency and non-discrimination obligations to remove hindrances to market access, or some other aspect of the problem. More importantly, there is a need to determine the appropriate role for the WTO over the longer term on antitrust policy matters.

In discussing this vision for the future, it would be helpful to consider the views of different member nations on establishing an international system of antitrust in general and on the appropriate role of the WTO in particular. The WTO Working Group received various communications from many nations. The discussion offers a description of some of these views.

(A) The views of different nations

1. The US

The position of the US on the appropriateness of the WTO as a forum for negotiating antitrust rules has been inconsistent. Whilst the US actively has supported efforts within the WTO's Working Group, it has expressed some reservation on the greater practical value of the WTO as a forum for negotiating any antitrust policy rules. The US has raised several concerns with respect to the WTO venturing into the domain of antitrust policy. The main view held by antitrust officials in the US is that the world antitrust community lacks the necessary knowledge on whether and to what extent key antitrust and trade policy issues may benefit from binding international agreements, let alone the difficulty of developing a consensus on these issues. In particular, US antitrust officials believe that there is an inherent risk that the WTO would second-guess prosecutorial decision making in complex evidentiary contexts –

a task in which the WTO has no experience and for which it is not suited – and would inevitably politicize international antitrust enforcement in ways that are not likely to improve either the economic rationality or the legal neutrality of antitrust decision making.[31] The main ingredient of US international antitrust policy has been to concentrate on the conclusion of bilateral agreements between different domestic antitrust authorities.[32]

2. The EC

Reference can be made at this stage to chapter 6, where it was argued that the EC has been in favour of a more internationalized antitrust policy. In particular, the European Commission has moved beyond placing a heavy emphasis on the importance and effectiveness of bilateral co-operative agreements between different antitrust authorities; the foundation tools in international antitrust policy issues. For the last decade or so, the Commission has been supporting the creation of an international system of antitrust. The Commission has recommended that preliminary negotiations look at restrictive business practices and abuse of market power, provide adequate and transparent enforcement and provide for international co-operation through exchange of non-confidential information, notification, and positive comity provisions. According to the Commission, a wider substantive convergence could be reached over time. The proposal suggests that these rules should be subject to dispute settlement, initially only for breaches of common principles or rules relating to the developing of systems of antitrust at the national level. Dispute settlement might also be used for alleged patterns of failure to enforce antitrust law in cases affecting the trade and investment of other WTO members.[33]

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[31] J. Klein "A reality check on antitrust rules in the WTO, a practical way forward on international antitrust", address before the OECD Conference on Trade and Competition (June 30, 1999), at p 6. See <http://www.usdoj.gov>.

[32] J. Klein has on more than one occasion argued in favour of bilateral agreements, such as those concluded by the US and Australia, Canada and the EC. See J. Klein "No monopoly on antitrust" *Financial Times* (February 13,1998), at p. 20, where he stated: "the US experience has shown that a crucial component of international antitrust policy is co-operation in the enforcement of national or regional competition laws . . . What is needed is to develop a culture of sound antitrust enforcement, built on the basis of shared experience, bilateral co-operation, and technical assistance to countries just starting down this road".

[33] See K. Mehta "The role of competition in a globalized trade environment", speech before the 3rd WTO Symposium on Competition Policy and the Multilateral Trading System, Geneva (April 17, 1999), <http://www.wto.org>. See also the proposal of the EC *Group of Experts*, discussed in chapter

This position of the EC has won some support by a number of nations, including Australia, Canada and Japan, although each of these also has communicated its views to the WTO. For example, Japan appears in favour of developing international antitrust rules but also has concurred with developing countries, particularly from the Asia-Pacific region, by emphasizing that multilateral negotiations on antitrust policy must include anti-dumping issues.[34]

3. Developing states

Doubts have been expressed by several developing states about the point of negotiating an antitrust agreement on the international plane, in general, and within the WTO in particular.

(i) Kenya

Kenya submitted its own views to the WTO, in which it noted that some developing states view the creation of an international system of antitrust as a way of "clipping the wings" of comparatively stronger undertakings of developing states so that they are not able to compete with strong undertakings of the developed states.[35] Therefore, Kenya proposed that any international system of antitrust should include a code of conduct for multinational undertakings.[36] Kenya also contributed its views on behalf of the African Group, emphasizing that the existence of domestic systems of antitrust, including effective enforcement authorities, was not common to all African states. The African states have recommended continuing with the educational, exploratory, and analytical work of the WTO's Working Group with enhanced technical assistance offered to developing states.[37]

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6. "Competition policy in the new trade order: strengthening international co-operation and rules" COM (95) 359, available at <http://www.europa.eu.int>.

[34] See Communication from Japan, WT/GC/W/308 (August 25, 1999). *Ibid.*

[35] See Communication from Kenya, WT/GC/W/233 (July 5, 1999), at p 9. *Ibid.*

[36] Note however, that efforts toward reaching consensus between developed and developing states for such a code failed previously at the UN. See Muchlinski, at p 10, note 1 *Ante.*

[37] See Communication from Kenya on behalf of the African Group, WT/GC/W/300 (August 6, 1999), note 33 *Ante.*

(ii) South Africa

South Africa has recommended embarking on a thorough educational process that would incorporate "huge analytical demands on developing states regarding the preparations of the next round" of negotiations.[38] To ensure fruitful results from this initiative, South Africa suggested that process should extend over a period of at least two years. It also recommended that resources be provided to developing states in order to allow them to participate in the formal negotiations in a meaningful manner.

4. Other states

(i) Korea

Korea generally supports the creation of an international system of antitrust with an effective dispute settlement mechanism. It has recommended however transitional periods for the application of the rules under the system according to the level of economic development in each state and other domestic conditions.[39]

(ii) Norway

Norway has been in favour of establishing an international system of antitrust within the WTO, taking due account of the special needs of states at different stages of development through transitional arrangements and technical assistance.[40]

(iii) Venezuela

Venezuela has recommended the development of an international system of antitrust, but it has not offered a detailed account on how this can be achieved; nor has it suggested what the content of the rules within the system should be.[41]

(iv) Turkey

Turkey has taken the view that creating an international system of antitrust would be helpful to achieve the objectives of the WTO, and has proposed that future work should be fostered to reach a common understanding on the issue. In its opinion, a

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[38] See Communication from the Republic of South Africa, WT/WGTCP/W/138 (October 11, 1999), at pp 2 & 4, note 33 *Ante*.

[39] See Communications from Korea, WT/GC/W/298 (August 6, 1999), note 33 *Ante*.

[40] See Communications from Norway, WT/GC/W/310 (September 7, 1999), note 33 *Ante*.

multilateral framework of antitrust rules should include provisions for transitional periods in order to allow members at different stages of development to subscribe to the commitments.[42]

(B) Business undertakings

One of the most important issues to be considered as far as private undertakings are concerned, is how they view the role of international organizations, such as the WTO. In the US, Business Roundtable has repeatedly voiced its anxiety about the necessity and productivity of antitrust policy negotiations at the WTO. According to Business Roundtable, international consensus on antitrust policy was a precondition to establishing any form of an international system of antitrust. In particular, Business Roundtable argued that consensus should be reached with regard to WTO's institutional competence in antitrust policy matters. Concerns have also been expressed regarding the possibility that the multilateral balance struck in the WTO Antidumping Code might be disturbed by the involvement of developing states in the negotiations. The roundtable indicated that a more appropriate role for the WTO would be to establish a new work programme to assist nations in developing antitrust policy issues, to act as an information "bank" and to provide technical assistance.[43]

The International Chamber of Commerce believes that a basis for an international system of antitrust within the WTO has yet to be established.[44] Mirroring this view are the words of the President of the US Council for International Business, opining that it would be premature for the WTO Working Group to consider adopting dispute settlement mechanism coupled with new international antitrust rules.[45] Instead, both groups are in favour of enhancing the educational tools in this area.[46]

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[41] See Communications from Venezuela, WT/HGC/W/281 (August 6, 1999), note 33 *Ante*.

[42] See Communications from Turkey, WT/GC/W/250 (July 13, 1999), note 33 *Ante*.

[43] See <http://www.wto.org>.

[44] See <http://www.iccwbo.org>.

[45] See *ICPAC*, at p 268.

[46] See <http://www.uscib.org>.

(C) Some analysis

Issues of international antitrust policy have been receiving increasing attention, within different groups and at different levels. The antitrust communities of nations have been largely occupied with working out what the next step should be in the internationalization of antitrust policy. Thus far, their efforts have not been confined to a particular topic or indeed any group of institutions. Clearly, it is advisable to further international antitrust policy initiatives through existing international organizations such as the WTO, the OECD and UNCTAD that have already instituted comprehensive programmes on antitrust policy. Some groups have even gone further by recommending that states examine the prospect of building co-operation between them and existing international organizations to forge a new initiative where government officials, private undertakings, non-governmental organizations and other interested parties can consult on matters of antitrust law and policy. This proposal has been put forward in 2000 by ICPAC, which stated that this could be called a "global antitrust initiative". It has recommended that this initiative should be open to developed and developing countries, be comprehensive or at least open to the possibility of breadth in its coverage of issue areas; and be accommodating to the private sector, non-governmental organizations and other interested parties.

Recommending the introduction of a "global antitrust initiative" connotes the need for a change in the present direction of internationalization of antitrust policy. Such a change is being considered due to the obvious limitations from which all existing international organizations dealing with issues of antitrust policy seem to suffer. Looking at the nature of WTO and the OECD would explain why a change is crucial.

1. The WTO

Whilst the WTO is of crucial significance in developing international antitrust policy, it seems to be subject to certain limitations. Notably, the WTO is broadly inclusive in its membership, but is principally concerned with governmental trade restraining practices. This gives rise to an important limitation because – in light of the discussion in the previous chapter – not all antitrust and trade policy problems overlap. Reflecting the general views of the US, ICPAC has argued that first, the traditional mandate of the WTO – negotiation of rules, which are then subject to dispute settlement – may be inappropriate for antitrust policy issues, which should

rather be discussed broadly and in a consultative manner; secondly, only a limited range of antitrust matters, if any, are likely to be successfully enforced in any organization that requires a binding commitment from nations; thus, it is inappropriate to add antitrust policy issues to the agenda within the WTO.[47]

Nevertheless, it is submitted that the WTO should not be regarded as totally unsuitable to pursue antitrust policy issues. Whilst it is acknowledged that not all antitrust and trade policy issues overlap, the fact that there is a close nexus between the WTO objectives of trade liberalization and the commitment of an increasing number of nations – most of whom are members of the WTO family – to instituting systems of antitrust and reinforcing existing ones is a factor in favour of developing an antitrust policy agenda at the WTO. Furthermore, the fact that the WTO is likely to receive support from other important organizations in the near future is another factor that is likely to enforce this argument. Nevertheless, it is acknowledged that certain institutional and policy limitations at the WTO have to (and can) be taken care of.[48]

2. The OECD

Like the WTO, the OECD constitutes an important forum for dealing with international antitrust policy issues, but equally is subject to its own limitations. As was seen above, discussion of international antitrust policy issues within the OECD have been conducted within the CLP and the JGTC, which have been particularly helpful in forging links between the domestic antitrust policies of the OECD's member nations, between antitrust and trade authorities and, to an extent, between the antitrust authorities of member nations and non-member nations. Amongst all existing international organizations, the OECD is the only organization where nations have committed themselves to obligations on antitrust policy. This is evident from the analytical and policy-oriented studies of global antitrust problems undertaken within the various committees. In this regard, the CLP deserves special mention due to the furthering of "soft convergence" of antitrust policies among member nations of the OECD and its promotion of the technical assistance to certain non-member nations.[49]

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[47] See the views of the US, at pp 231-2 *Ante*.

[48] See chapter 11.

[49] For up-to-date information on the various programmes at the OECD, see http://www.oecd.org.

However, little success has been achieved by the OECD in establishing rule-making or dispute settlement mechanisms. This is, of course, an obvious limitation to which the OECD is subject. Another obvious limitation concerns the fact that there are only 29 nation members within the OECD family. This means that several nations that either have systems of antitrust in place or are considering instituting such systems are not members of the OECD. In addition, the current deliberations at the OECD do not seem to be particularly receptive to the specialized needs of non-member states with new systems of antitrust.

3. A comment

As a result of the limitations associated with the WTO and the OECD, it is understandable why a serious (perhaps even a fresh) consideration of antitrust policy and in its place in the global economy should be undertaken. Undoubtedly, the work of these organizations has been extremely valuable – and continues to be so – in furthering the scope and idea of the internationalization of antitrust policy.[50] Nevertheless, it is obvious that it is necessary at present to expand on the agenda, institutional capabilities and mechanisms of these organizations.[51]

IV. POLITICAL POWER AND PERSPECTIVES OF STATES, UNDERTAKINGS AND CONSUMER INTERESTS

(A) Overview

Having looked at the role of existing international organizations which deal with the internationalization of antitrust policy, the discussion now turns to analyzing the issues from the perspective of the states, undertakings and consumers. Previous chapters have already made it clear that in the internationalization of antitrust policy, sovereign states are not the only actors; there are also forces from above and below the state. From above, stand regional and international organizations, such as the EC, NAFTA, the WTO, OECD etc. Examining these political forces in the internationalization of antitrust policy, as chapters 5 and 7 argued, is important before one can complete an analysis of the internationalization of antitrust policy. From

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[50] See J. Shelton "Competition policy: what chance for international rules", speech at the Wilton Park Conference (November 24, 1998), available at <http://www.oecd.org/daf/clp/speeches/JS-WILTO.htm.>.

[51] See chapter 11.

below, on the other hand, there are equally important forces. One such force is the role business undertakings, which have gained increasing importance in the internationalization of antitrust policy.

An examination of future possible directions of more internationalized antitrust policy must be sensitive to the basic forces of international political power and the views of not only states but also undertakings. Doern has argued that this variable has received little attention in the literature partly because the internationalization of antitrust policy is a more recent phenomenon, but more importantly because lawyers and economists do not tend to concern themselves with these issues.[52]

(B) States on the international plane

If one categorizes the different views on the role of the state on the international plane, it may be possible to conclude that there are several schools of thought. Chapter 5 gave an account of some of these. It may be appropriate to mention in the present context one additional school of thought: public choice theorists. This school is keen to reverse assumptions made by Realist and Neorationalist scholars on the primacy of states,[53] with the result that domestic politics would dominate the international scene. However, the public choice approach does not pervade actual domestic decision-making institutions. In addition, it even plays down international organizations because the state is viewed as standing at the centre. For this reason, this approach does not seem to add anything to what Realism and Neorationalism have already supplied. Nevertheless, the public choice approach is interesting because of its focus, unlike the latter schools of thought, on institutional dimensions.

(C) Perspective of undertakings

Private economic power constitutes a central element in the study of international political economy and domestic policy formulation. On the one hand, undertakings exercise power in a profound functional sense simply and directly because they play a role in enhancing the economic prosperity of nations, especially developed ones. On

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[52] See C. Doern & S. Wilks *Comparative Competition Policy* (Oxford, 1996), at p 306.

[53] See chapter 5.

the other hand, the lobbying capacity of undertakings affords them the opportunity to acquire political power.[54]

The economic power of multinational undertakings can also be observed in light of market globalization. Thus, multinational undertakings are a crucial variable in determining the extent to which antitrust policy is internationalized. Business undertakings have always played an important role in the developing of the antitrust laws of nations, but such laws contain provisions that may also limit the freedom of action of those undertakings, especially when competition in the market place is likely to be distorted.

At the moment, amidst relentless globalization, it is not yet clear which particular industrial sectors or key multinational undertakings will support or resist the move towards greater internationalization of antitrust policy. Business advisory groups are a part of the OECD and EC antitrust policy network, and thus business views are often expressed – albeit in a limited manner – within these forums.[55] Moreover, among some sectors there is the presumption that the electronic commerce sector will be especially interested in new antitrust rules at the international level.[56]

Perhaps what can be said is that much more needs to be known about the views and needs of business undertakings in light of all efforts to further the internationalization of antitrust policy. This is a topic that has received insufficient attention by lawyers and economists alike.

It is generally assumed that business undertakings are in favour of the internationalization of antitrust policy and the creation of an international system of antitrust. Several business concerns can be mentioned here in support of this assumption.

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[54] See M. Olson *The Logic of Collective Action* (Schochen Books, 1965); D. *Mueller Public Choice* (Cambridge University Press, 1979).

[55] See <http://www.oecd.org>.

[56] For a good account of this issue see the *ICPAC*, at pp 287-92.

1. Ensuring uniformity

Business undertakings prefer uniformity in the way antitrust cases are handled and decided. As business operations increasingly transcend national boundaries, such operations become subject to the jurisdiction of more than one domestic antitrust authority. As the number of domestic systems of antitrust increase around the world, more and more domestic antitrust authorities are likely to become involved in one and the same business operation.[57] Equally likely is the possibility that these authorities may reach conflicting decisions – or at best different conclusions – over the legality of the same practice.[58] The business community is not so much concerned about the possibility of more than one domestic antitrust authority asserting jurisdiction over a particular operation as much as they are concerned about the possibility that these authorities may reach inconsistent decisions.[59]

2. The possibility of conflicts between states

The involvement of more than one antitrust authority and the reaching of inconsistent results by those authorities in a particular transaction may lead to international conflicts between the states concerned, especially over industrial policy. Business undertakings are generally interested in the prospect of being caught in such conflicts, where it is normal for industrial policy considerations and other considerations to override antitrust policy considerations.[60]

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[57] The *Exxon/Mobile* operation was notified in no fewer than twenty jurisdictions. For a comment on this issue see "*Exxon-Mobile*: conquering the world" (1999) 13 *Antitrust* 16; The Wall Street Journal (Nov. 30, 1998). Also, the *MCI/WorldCom* transaction in 1997 was reviewed by more than 30 antitrust authorities. See A. Frederickson "A strategic approach to multi-jurisdictional filings (1999) 4 *Eur. Counsel* 23.

[58] See *Shell/Montedison* Commission Decision 94/811 OJ [1994] L-332/48; also *Boeing/McDonnell Douglas* OJ [1997] L 336/16.

[59] See D. Wood & R. Whish *Merger Cases in the Real World: A Study of Merger Control Procedures* (OECD, 1994), at pp 85-95. Note however that reaching conflicting decisions may be inevitable in some cases, mainly due to the structure of the relevant market and the levels of its concentration. Also, differences in the legal standards employed by different antitrust authorities can contribute to inconsistencies. See further chapters 3 and 4.

[60] Other considerations include restructuring of industries, such as defence (See J. Nannes "Strategies alliances and converging industries: the government's perspective on corporate combinations", address before the American Bar Association Section of Public Utilities, Communications and Transportation Law (August, 1999), available at <http://www.usdoj.gov/atr/public/speeches/2356.htm>), liberalizing international air travel (European Commission Press Release "European Commission publishes its conditions for approving the British Airways/American Airlines air alliance (July 8, 1998), available at <http://www.europa.eu.int/rapid/start/cgi/guesten.ksh>) and deregulating the telecommunications

3. Differences in procedures

Business undertakings are concerned by the length of time required for different antitrust authorities to reach a decision on a particular operation because delays in decision-making may be harmful to the interests of business undertakings, especially in the case of mergers. Hence, business undertakings seem to favour speedy decisions by antitrust authorities. One does not need to look beyond the examples provided by the EC and US merger review regimes to deduce the concern of undertakings in this context.[61] Surely, differences in procedure may subject undertakings to the burden and expense of having to comply with the laws of different nations.[62]

4. The use of confidential information

Business undertakings are generally concerned about situations in which one antitrust authority hands over confidential information about those undertakings to another one. The fear is that the latter may use this information for economic espionage. Also, there is an anxiety when information is handed over to a jurisdiction which allows private actions.[63] These actions are considered to be a "rogue elephant" because private plaintiffs in these actions are not under the same constraints as antitrust authorities, for example regarding breach of confidence.[64] So, there may be a risk of confidential information disclosed to other undertakings and individuals.

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market (See Department of Justice Press Release "Justice Department clears *WorldCom/MCI* merger after MCI agrees to sell its Internet business" (July 15, 1998), available at <http://www.usdoj.gov/atr/public/press_releases/1998/1892.htm>).

An obvious example where business undertakings may be caught in conflicts between states relates to the doctrine of extra-territoriality. See chapter 8.

[61] See J. Griffin "What business people want from a world antitrust code" (1999) 34 *New Eng. L. Rev.* 39, at p 42.

[62] See Remarks by P. Condit, CEO of Boeing Corporation, about the conflicting results reached by the EC and the US in the *Boeing/McDonell Douglas* merger, "Boeing Responds to European Commission Recommendation", Boeing Press Release (July 16, 1997). See <http://www.boeing.com>.

[63] See pp 180-1 *Ante.*

[64] See W. Knighton "Nationality and extraterritorial jurisdiction: U.S. law abroad", address at Georgetown University Law Centre (August 13, 1981).

(D) Consumer perspective

It is believed that the interests of consumers and producers in a global economy would be maximized if antitrust rules as wide as markets were introduced. This view is based on the understanding that a global vision would better facilitate the appraisal of positive as well as negative impacts of international operations of undertakings.

Important organizations, such as the OECD, World Bank, the WTO and Consumers International[65] have in recent years devoted special attention to consumers interest in global markets, as well as advocating ways to protect this interest. A clear consensus has been emerging, especially at the WTO and the OECD, that introducing global antitrust rules would enhance the welfare and interest of consumers in global markets. A 1995 OECD report has stated:

> "As trade policy should be made much more responsive to the interests of consumers, so should competition policy probably take international considerations and the interests of both producers and consumers beyond domestic jurisdictions greater into account."[66]

The WTO has expressed a similar view:

> "Even where the criteria of allocative efficiency are solely applicable, the fact that such criteria are generally applied in respect of efficiency and welfare within the jurisdiction in question and may not take into account adverse effects on the welfare of producers and consumers abroad may lead to situations where the enforcement of national competition law will not adequately take into account the interests of trading partners."[67]

The argument in favour of global antitrust rules aside, it seems that currently there is a heated debate on whether globalization in general would benefit consumers. It may be of interest to note the position of *pro* and *anti* globalizers. The former tend to assume markets are competitive, including developing countries and those in transition. According to pro-globalizers, liberalization will benefit consumers. Anti-globalizers on the other hand, have adopted a different stance, arguing that liberalization would have the opposite effect, namely leading to damaging monopolies.

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[65] See http://www.consumersinternational.org.

[66] *New Dimensions of Market Access in Globalizing World Economy* (OECD, 1995), at p 254.

[67] WTO *Annual Report* (1997), at p 75.

However convincing the arguments of either camp, it seems clear that this is another situation where a *Neofunctionalist* approach would be appropriate.[68] Thus, disagreements between *anti* and *pro* globalization as far as the benefit to consumers is concerned should be worked out on a country-by-county basis and industry-by-industry basis. There is simply no room for assumption.

V. MODEL SYSTEMS OF ANTITRUST

(A) Several examples

This part is not intended to be an exhaustive study of different model systems of antitrust in the world. The aim is merely to provide an account of several models, as they represent important polarities.

1. The US model

The model served by the US system of antitrust is essentially one based on the principle of free market. The system, as evidenced in the interpretations and analyses applied to the US antitrust laws, mainly aims to combat anti-competitive behaviour that harms consumer welfare and reduces efficiency. The system is based on the ideology that, save for cases where a specific behaviour is seen as anti-competitive, public intervention in the market is unnecessary. Every undertaking is free to compete, including dominant undertakings, even if some competitors will be injured along the way.[69]

The statutory language of the US antitrust laws is generally very broad. Congress did not provide an interpretation of the various terms covered under these laws. As a result, US courts gave a common law interpretation to these provisions. For example, Section 1 of the Sherman Act 1890 prohibition covers "restraint of trade". The federal courts have held that only "unreasonable restraints of trade" should be covered.[70] The jurisprudence of the courts has developed around two complementary modes of

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[68] The theory of *Neofunctionalism* has already been discussed in chapter 5, and was employed in chapter 9.

[69] See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

[70] See *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911); *Chicago Board of Trade v. United States, 246 U.S.* 231, 238 (1918).

analysis: the *per se* and *rule of reason* approaches.[71] The former covers a restraint that "facially appears to be one that would always or almost always tend to restrict competition and decrease output" rather than "one designed to increase economic efficiency and render markets more, rather than less, competitive".[72] The latter is an inquiry whether a restraint "is one that promotes competition or one that suppresses competition", looking at the circumstances, details and logic of the restraint.[73]

There are several striking features about US system of antitrust that must be mentioned. First, under the system, the Department of Justice and the Federal trade Commission – the antitrust authorities in charge of enforcement of US antitrust law – lack competence to grant exemptions to undertakings from the prohibitions of antitrust laws, and even to issue a binding decision on undertakings in the first place.[74] Rather the authority in charge in a particular case is under an obligation to approach the judiciary to establish a violation before an injunction may be granted or a fine issued. Secondly, serious violations of US antitrust laws can be prosecuted criminally e.g. price fixing cartels.[75] Thirdly, attorney generals in different states can bring actions to enforce US antitrust laws, even where the Department of Justice and the Federal Trade Commission have reviewed the matter and reached a different conclusion.[76] Fourthly, the US system of antitrust allows private injured parties to

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[71] The academic literature on this issue is abundant. See R. Bork "The rule of reason and per se concept: price fixing and market division" (1965) 74 *Yale L. J.* 775; T. Piraino "Reconciling the per se rule and the rule of reason approaches to antitrust analysis" (1991) 64 *So. Cal. L. Rev.* 685; "Making sense of the rule of reason: a new standard for section 1 of the Sherman Act" (1994) 47 *Van L. Rev.* 1753; O. Black "*Per se* rules and *rule of reason*: what are they" (1997) 18 *ECLR* 145; V. Korah "The rise and fall of provisional validity – the need for a rule of reason in EEC antitrust" (1981) 3 *Nw. J. Int'l L. & Bus.* 320; R. Joliet *The Rule of Reason in Antitrust Law: American, German and Common Market Laws in Comparative Perspective* (Hague, 1967); R. Whish & B. Sufrin "Art. 85 & the rule of reason" (1987) 7 *Y. E. L.* 1; V. Korah "EEC competition policy – Legal form or economic efficiency" (1986) 39 *C. L. P.* 85.

[72] *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, (1979), at pp 19-20.

[73] *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), at p 691. See also Muchlinski, at p 392, note 1 *Ante*; S. Anderman *EC Competition Law and Intellectual Property Rights* (Oxford, 1998), at pp 31-2.

[74] See chapter 4.

[75] Only Japan and Canada allow criminal prosecution under their domestic antitrust laws.

[76] It may be interesting to compare this situation with those in Canada and Mexico, where provinces and states are not allowed to enforce national antitrust laws.

bring their own antitrust actions. Fifth, the US system includes a treble damages remedy and the "Noerr" doctrine, dealing with antitrust petitioners immunity.[77]

2. The EC model

This model has been extensively discussed in chapter 6, therefore it does not merit repetition at present.

3. The Federal German model

The German system of antitrust is based on social market principles, in particular on the significance of antitrust as a "regulator" to protect against abuses of political as well as economic power in part by safeguarding the freedom of private enterprise. The system shares several common features with the US system. Nevertheless the following differences may be observed. First, the system is more interventionist than its US counterpart as far as abuse of dominance is concerned. Secondly, the system ascribes greater importance to the protection of competitors in merger cases than the US system.[78]

4. The Japanese model

The Japanese system of antitrust is based on the principle of industrial policy with competition and significant government intervention, a model also in existence in a few Southeast Asian nations.[79] The origins of the system date back to the 1940s when the US attempted to export its antitrust tradition into Japan. Some common features can be identified between the Japanese Anti-Monopoly Law and the US Sherman Act. However, differences can be deduced in the case of vertical restraints. Under the Japanese Anti-Monopoly Law, vertical restraints are covered under the section on unfair business practices. The section covers, *inter alia*, passing-off and all conducts

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[77] See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Under the doctrine, it is not unlawful to petition the government for anti-competitive restraints against competitors. Indeed, the right to petition is well-founded under the US Constitution, First Amendment, Right to Petition. It may be of interest to note that in the Antitrust Enforcement Guidelines for International Operations (1995), the Federal Trade Commission and Department of Justice stated that they would apply the "Noerr" doctrine to the petitioning of foreign governments in the same manner they treat attempts to petition the US government.

[78] See the German Cartel Office's web site <http://www.bundeskartellamt.de/english.html.>.

[79] One such country is Korea. For a good examination of the system see D. Sakong *Korea in the World Economy* (Institute for International Economics, 1993).

considered unfair, which in the US are not considered as "antitrust law issues" as such.[80]

Initially, the Japanese Ministry of International Trade and Industry enjoyed extensive powers in controlling the national economy. It adopted a regulatory policy, based on its regulatory law, encouraging undertakings to co-operate between themselves and with the government. This co-operation took the shape of the creation of associations of undertakings which shared common directors, ownership of shares and suppliers and customers. These were called "keiretsu".[81] The integration of Japan into world trade has, however, somewhat undermined the position of Keiretsu and the regulatory barriers which these often erected. Nevertheless, complaints from Japan's trading partners are sometimes made about market access barriers, which seem to indicate that the idea of Keiretsu has not been entirely extinguished.[82]

5. The Chinese model

The Chinese model is essentially statist. Until recently, the state owned all business in China though, unfair competition law prohibits passing-off, boycotts and behaviour deemed unfair. There is no antitrust authority in China but more recently, a proposal to introduce a system of antitrust has been prepared.[83]

(B) A comment

The introduction to the thesis stated that nearly 90 nations have introduced systems of antitrust in the world. The flip-side of this means that many others do not have such systems. Some nations have free-market principles but have not yet adopted antitrust laws. For example, Hong Kong and Singapore have relied on the market itself to provide the forces of competition, choosing free trade as their antitrust policy. Other nations have laws against restrictive business practices such as several African and

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[80] Note that in the US, fair trading laws have been repealed.

[81] See J. Davidow "The application of U.S. antitrust laws to *kieretsu* practices" (1994) 18 *World Comp.* 5; Muchlinski, at pp 69-70, note 1 *Ante*.

[82] See pp 197-9 *Ante*. For more information about Japanese system of antitrust law see the Japan Fair Trade Commission's web site <http://www.jftc.admix.go.jp>.

[83] See T. Yu "An anti-unfair competition law without a core: an introductory comparison between U.S. antitrust law and the new law of the People's Republic of China" (1994) 4 *Ind. Int'l & Comp. L. Rev.* 315.

Southeast Asian nations, a number of which have some reservations regarding capitalism.[84]

The fact that many nations do not have antitrust laws may affect the role of antitrust policy in the global economy as an effective means to address anti-competitive behaviour that impedes and distorts the flows of trade and investment between nations. These nations are at a disadvantage in combating certain anti-competitive behaviour with international components, both because multinational undertakings are likely to be more responsive to the antitrust authorities of the major economies where such behaviour is concerned and because of their greater need for accessing information outside the jurisdictions. This highlights the importance of international co-operation for them. But these nations generally do not participate in the most active instruments, which have the advantage of building a long process of mutual confidence. They sometimes do not have antitrust authorities and, where they do, they may be resource constrained.[85]

Undoubtedly, most of these disadvantages should disappear if these nations are encouraged, or actually seek, to adopt antitrust laws in their national legal orders.

Another comment should be made on the fact that the above mentioned model systems of antitrust differ in many ways. The fact that this is so is bound to affect the internationalization of antitrust policy, especially if strong models are likely to impose their standards on the weaker models. In addition, differences may lead to conflicts between the different models, especially between the stronger ones, as the following discussion shows.

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[84] Arguably, the collapse of many Asian economies in 1998 seems to have heightened the fear of these states about capitalism. See W. Kovacic "Capitalism, socialism and competition policy in Vietnam" (1999) 13 *Antitrust* 57; "Merger enforcement in transition: antitrust controls on acquisitions in emerging economies" (1998) 66 *U. Cin. L. Rev.* 1075; "Getting started: creating new competition policy institutions in transition economies" (1997) 23 *Brooklyn J. Int'l L.* 403; N. Pakaphan "Indonesia: enactment of competition law"; W. Cho "Korea's economic crisis: the role of competition policy"; S. Supanit "Thailand: Implementation of competition law" (1999) 27 *Int'l Bus. Law.* 491, 495 and 497 respectively.

[85] WTO *Annual Report* (1997), at p 32.

VI. THE EC-US CONFLICT

Previous chapters put forward several reasons why attention has been turning to the internationalization of antitrust policy. Those reasons are important. However, one can find at least one additional reason, which seems to be of considerable importance. The reason concerns the conflict between the EC and the US. As was said before, the EC has been in favour of more internationalized antitrust policy. It has proposed developing antitrust rules within the WTO. The US, on the other hand, has been very sceptical about this, and has rejected any move to that effect.

Equally however the conflict between the EC and the US is caused by differences in the substantive laws and procedures of the two jurisdictions. This as well as chapter 8 have spelt out these differences and how they impact on the internationalization of antitrust policy. The fact that the economic policies prevalent in the two jurisdictions also differ make this impact all the greater.

The EC has given the world community a conception in respect of the internationalization of antitrust policy, which in some way has been based on the challenge to build a single integrated market. This conception seems to have been strengthened by the fact that Member States have been converging their domestic antitrust laws towards EC antitrust law, with the result that major business operations in the EC will be relieved from the burden of multiple application of different antitrust laws with different standards. This strength has also been enhanced by the fact that Central and Eastern European Countries have been taking steps to approximate their antitrust laws towards EC antitrust law.

It may well be anticipated that the internationalization of antitrust policy and the creation of an international system of antitrust will eventually depend on the respective positions of the EC and the US. The above discussion made it clear that the systems of antitrust in both jurisdictions have grown in significance and this ensured the influence of both systems on the international plane, perhaps with the balance tilted toward the EC system of antitrust.[86]

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[86] The EC and the US have been particularly active in encouraging nations to introduce systems of antitrust law, especially ones based on the EC and US models, in their legal orders. See Fiebig, at p 236, note 9 *Ante*; R. Rice "Brittan urges basic competition rules" Financial Times (November 8, 1993), at p 3; K. van Miert "Competition policy in relation to the Central & Eastern European Countries-

Some states have based their antitrust laws exclusively on EC antitrust law. These include most Central and Eastern European Countries.[87] Other states seem to have turned to the US model and not to the EC when adopting antitrust laws. One such state is Mexico whose adoption of antitrust law formed part of the state's opening of national economy in anticipation of NAFTA.[88] Between these two ends, a few states have adopted combined aspects of EC and the US antitrust laws. For example, Canadian antitrust law on dominance is similar to that of the EC, while provisions on mergers, horizontal and vertical agreements are similar to US antitrust law.[89] Other states include Australia,[90] New Zealand,[91] Argentina,[92] Columbia,[93] Venezuela[94] and Brazil.[95]

Against these categories stands an independent category of states – normally developing ones – who have opted for neither the EC nor for the US type of antitrust laws because they fear that antitrust law is a tool for developed states to exploit the economy of less developing states. This is an interesting situation, because it seems

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achievements and challenges" (1998) 2 *Comp. Pol'y NewsL.* 1; K. McDermott "U.S. officials provide competition counselling to Eastern Europe" (1991) 5 *Antitrust* 4; S. Singham "US and European models shaping Latin American competition law" (1998) 1 *Global Comp. Rev.* 15.

[87] M. Ojala *The Competition Law of Central and Eastern Europe* (Sweet & Maxwell, 1999); M. Cowie & M. Novotria "Pre-merger notification in Central and Eastern Europe" (1998) 12 *Antitrust* 19; C. Brzezinski "Competition and antitrust law in Central Europe: Poland, the Czech Republic, Slovakia and Hundary" (1994) 15 *Mich. J. Int'l L.* 1129; G. Oprescue & E. Rohlck "Competition policy in transition economies: the case of Romania" (1999) 3 *EC Comp. Pol'y NewsL.* 62.

[88] See G. Castañeda & F. Ugarte "Mexico still setting the pace for Latin America" (1998) 1 *Global Comp. Rev.* 12. More information can be found on the Mexican antitrust authority's web site <http://www.cfc.gob.mx>.

It may be observed that NAFTA requires all participating states to "adopt or maintain measures to prescribe anti-competitive business conduct, and . . . take appropriate action with respect thereto". See Article 1501(1).

[89] See the Canada Competition Bureau's web site, <http://www.strategis.ic.gc.ca/competition>.

[90] See the Australian Competition and Consumer Authority's web site, <http://www.accc.gov.au>.

[91] See the New Zealand Commerce Commission's web site, <http://www.comcom.govt.nz> and New Zealand Ministry of Commerce's web site, <http://www.moc.govt.nz>.

[92] See Argentina antitrust authority, Comisión Nacional de Defensa de la Competencia's web site, <http://www.mecon.gov.ar>.

[93] See the Superintendencia Brancia's web site, <http://www.superbancaria.gov.co> and the Superintendencia de industria y comercio's web site <http://www.sic.gov.co>.

[94] See the Procompetencia's web site, <http://www.procompetencia.gov.ve>.

that these states are keen on ensuring adequate control on anti-competitive behaviour,[96] especially since they may be subject to the risks of such behaviour in light of the dismantling of state barriers to the flows of trade and investment between nations and since they may be subject to the extra-territorial application of antitrust laws of other states.

VII. CONVERGENCE AND HARMONIZATION

During the last ten years or so, domestic antitrust laws have been converging, which has been facilitated by several factors. Perhaps the most obvious one is the informal process of bilateral co-operation between domestic antitrust authorities. Domestic antitrust authorities have, albeit to a limited extent,[97] increasingly engaged in informal consultations among themselves in enforcement matters in cross-border antitrust law cases.[98] Co-operation has been particularly common in merger cases.[99] For example, Canadian, EC and US antitrust authorities quite frequently exchange views on their analytical approaches on issues such as market definition and economic analysis in general in these cases. Furthermore these antitrust authorities have offered valuable technical assistance to states with economies in transition and others with infant experience using the concept of competition and antitrust law. This process of technical assistance has generated many benefits. Perhaps the most important of which is the fact that the very process of exchange of information-sharing has clarified differences between the EC and US systems as well as differences between what mature systems offer and what developing states think is appropriate for their economic and political conditions. By the same token, co-operation helps identify the areas of agreement among nations, promote convergence and further common

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[95] See the Brazilian Competition Tribunal's web site, <http://www.mj.gov.br/cade>.

[96] I. Kyvelidis "State isomorphism in the post-socialist tradition" (2000) 4 *European Integration Online Papers*, available at <http://www.eiop.or.at/eiop/texte/2000-002.htm>; J. Hellman "Constitutions and economic reform in the post-communist traditions" (1996) 5 *East Eur. Const. Rev.* 46; Fiebig, at p 237, note 9 *Ante*.

[97] For example limitations of confidentiality restrictions in national laws.

[98] The US and Germany have organized international meetings of enforcement officials from antitrust authorities around the world to discuss enforcement matters against cartels and other restrictive practices.

[99] See, for example, how the US and the EC co-operated in a meaningful way in their handling of the *MCIWorldCom/Sprint* operation. See chapter 6, note 107.

understanding. The benefits of co-operation and technical assistance can be observed in the case of South Africa and Israel, where antitrust authorities have relied heavily on information from other jurisdictions when interpreting, applying and enforcing their laws.[100]

Convergence of antitrust laws may be observed in different forums, including the EC, in the US, and even in the OECD. It has been argued that convergence is a prerequisite to any move towards comprehensive internationalization of antitrust policy, including the creation of an international antitrust code.[101] Whether this is a valid argument or not depends on certain factors, which will be alluded to in chapter 11, as well as on the advantages and disadvantages associated with such convergence that are important to highlight.

(A) Advantages

1. Sovereignty and related considerations

An obvious argument that has been advanced is that convergence, especially soft convergence, is preferable to the creation of an international system of antitrust with autonomous institutions or an international code of antitrust. This is because, unlike the latter, it hardly threatens the sovereignty of states and the enforcement prerogatives of different national antitrust authorities.

2. The needs of states with no antitrust laws

Another argument in favour is that the creation of an international system of antitrust is quite ambitious for the moment, so for this reason one must focus on important intermediate steps in convergence. Harmonization, in this regard, is seen as such an important step, which can help states with no antitrust laws to develop them.

3. Relief for undertakings from dealing with multiple systems

Convergence of domestic antitrust laws offers substantial benefits to undertakings operating in international markets. In particular, undertakings would be offered relief from the burden of having to deal with different systems of antitrust. The net result

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[100] See Israel's antitrust authority, <http://www.antitrust.gov.il>.

[101] See *Group of Experts*, at p 14, note 33 *Ante*. See further chapter 11.

would be that the cost of their operations and compliance would be substantially reduced as well as enhancing an efficient marketplace. Moreover, it is guaranteed that, with convergence, uniformity of approach by different antitrust authorities will be more likely than otherwise. This is especially so in merger review cases.[102]

4. Removing hindrances to market access

Convergence is likely to enhance the flows of trade and investment between nations by removing market access-restraining private anti-competitive behaviour. This is especially valuable in the case of those states which have not been tough enough on private anti-competitive behaviour within their own boundaries and thus have impaired the entry to domestic markets by foreign undertakings and in the case of states with no antitrust laws.

(B) Disadvantages

Offsetting these advantages there are some disadvantages associated with convergence of domestic antitrust laws which must be mentioned:

1. The long process inherent in convergence

It would not be difficult, in the light of the discussion in chapters 3 and 6, to point out the fact that convergence of domestic antitrust laws is a very slow process, and as a matter of fact its success cannot be guaranteed. In the EC, despite the strength of the EC system of antitrust and its influence on Member States' domestic systems of antitrust, convergence has been developing for more than fifty years without reaching its full maternity. On the basis of this situation, it is difficult to imagine that better progress, or even an equal one, will be made in the convergence of domestic antitrust laws in the world. Nations do not share common antitrust traditions. Furthermore, their seriousness in enforcing their antitrust laws differs, not to mention the fact that some nations do not even have antitrust laws in place at the moment.

2. The different goals of antitrust law

Those nations with antitrust laws differ with regards to what the goals of antitrust law should be. Whilst some nations have opted for economic goals, others have used their

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[102] See p 242 *Ante*.

antitrust laws to further social and even political goals.[103] Of course, an attempt to converge antitrust laws with different goals risks collision between them. In addition it is very likely that some goals advocated by strong nations will override competing ones advocated by weaker nations.

3. Defining "competition"

It is not clear whether nations agree on how the concept of "competition" should be defined and understood. Furthermore, there does not seem to be full consensus on whether antitrust law should be used to protect competition. As was said earlier in the chapter, some nations have opted for systems based on the principle of restrictive business practices as opposed to competition, a fact that will undoubtedly widen the differences between nations.[104]

VIII. SUBSTANTIVE ISSUES

In 1993, a Multilateral Antitrust Code with substantive principles to be enforced by an autonomous antitrust authority was proposed by the Munich Group, a private group made of 12 scholars and experts.[105] A proposal was put forward by the Group to establish minimum standards which could then be incorporated into the WTO. Those standards would be enforceable by domestic antitrust authorities in their jurisdictions. In case of disputes, the Group suggested that they should be heard by a permanent international antitrust panel, forming part of a wider dispute settlement mechanism. The areas which were proposed to be covered under the standards included specific principles of antitrust law, national treatment, supervision of enforcement by an independent authority empowered to request domestic courts and antitrust authorities to initiate investigations and inter-governmental dispute settlement procedures.

At a supranational level, several proposals have been made. One is to establish an international variant of the domestic systems of antitrust. The idea here is to develop through the support of the WTO structural features of systems of antitrust. Here, the WTO would create a set of rules with a dispute settlement mechanism, which would

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[103] See pp 38-45 *Ante*.

[104] See chapter one.

[105] International Antitrust Code Working Group, Draft International Code as a GATT-MTO Plurilateral Trade Agreement (July 10, 1993).

require states to introduce antitrust laws in their jurisdictions. Another proposal put forward for involving the WTO has been to develop general principles, both procedural and substantive of antitrust law.[106] The OECD and the World Bank have been seeking for the last three years to develop a "Global Corporate Governance Forum".[107] The OECD has also developed a set of "best practices" principles on corporate governance, which complement its joint projects with the World Bank. The joint initiative has been hosting meetings and workshops attended by representatives of the business community and governments of nations.

There seems to be a recognition that states may be prepared to co-operate in meaningful ways on the internationalization of antitrust policy, but are not necessarily prepared to be legally bound by substantive provisions under public international law. The Asia-Pacific Economic Co-operation Forum (APEC) has been built on this recognition that it is possible to advance some liberalization and harmonization of practices outside a framework binding legal instruments. The proposed global antitrust initiative by ICPAC is built on the premise that nations can usefully explore areas of co-operation in the field of global antitrust policy and facilitate further convergence and harmonization. Nations do not seem to be prepared to be bound in all areas of restrictive business practices. In some cases, nations seem to prefer developing a common understanding through consultations and non-binding principles.

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From the above, it seems that the internationalization of antitrust policy has evolved into a topic of great contemporary importance and debate. Over the last eighty years or so, considerable efforts have been made to address this topic and these continue to be of crucial significance. The chapter analyzed these efforts, drawing comparative analyses where appropriate. It seems that one can expect this topic to be subjected to heated debate in the years to come. At present, antitrust policy varies in terms of its development and understanding, whether within individual states or within existing

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[106] See the suggestion by J. Shelton, former Deputy Secretary-General of the OECD, made in 1999, <http://www.oecd.org>.

[107] See <http://www.gcgf.org>.

international organizations. The fact that this is so leaves a general consensus between nations on the creation of an international system of antitrust, or even substantive harmonization amongst different systems of antitrust, far from appearing on the horizon in the near future.[108]

It seems that the success in making consensus more imminent, and even going beyond this, depends in large part on the position of the EC and the US, and the extent to which it is possible to create a common ground between the two systems of antitrust in the internationalization of antitrust policy and the desirability of an international system of antitrust.[109] The EC has expressed very positive views in favour of building an international system of antitrust in order to better address trans-national antitrust issues and tackle political conflicts resulting from the overlap in application of different antitrust laws.[110] Conversely, the US remains doubtful about the need and desirability for such system.[111] The fact that the EC has been active in the international antitrust policy scene and that EC system of antitrust has developed into a strong system have meant that the US has lost the dominant position that it held for many years in this scene. Today, there are nearly 90 nations which have adopted some antitrust law and more than 25 others are currently seeking to develop the process. At present, EC antitrust law and US antitrust law stand in the positions of equals. Within the EC, the antitrust laws of several Member States, most notably Germany play important role in regulating many business operations with international components. Moreover the antitrust law of Japan has gained greatly in significance and impact in

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[108] G. Drauz & T. Lingos "The treatment of trans-border mergers in the 1990's: a European perspective" in *Policy Directions for Global Merger Revie*w, a special report by the Global Forum for Competition and Trade Policy (1999), at p 58; J. Klein "A note of caution with respect to a WTO agenda on competition policy", address before The Royal Institution of International Affairs, London (November 18, 1996); D. Melamed "Antitrust enforcement in a global economy" (1998) *Fordham Corp. L. Inst.* 1; W. Baer "International antitrust policy" (1998) *Fordham Corp. L. Inst.* 247; A. Schaub "*Boeing/MDD*" (1998) 1 *EC Comp. Pol'y NewsL.* 2, at p 4.

[109] See D. Gerber "Afterword: Antitrust and American Business Abroad revisited" (2000) 20 *Nw. J. Int'l L. & Bus.* 307, at p 310.

[110] See K. van Miert "The WTO and competition policy: the need to consider negotiations", address before Ambassadors to the WTO (April 21, 1998), available at <http://www.insidetrade.com/sec-cgi>.

[111] See D. Valentine "Building a cooperative framework for oversight in mergers-the answer to extraterritorial issues in merger review" (1998) 6 *Geo. Mason. L. Rev.* 525, at p 529; D. Wood "Caution necessary concerning WTO agenda on competition rules: Justice officials warn" (1996) 13 *Int'l Trade Rep.* 1856.

recent years, and even in Latin America, the African continent and the Middle East antitrust law is being taken more seriously.[112]

Reaching some form of consensus on the internationalization of antitrust policy is subject also to other challenges. However, perhaps the greatest challenge in this instance is to convince national politicians and antitrust regulators that fostering greater internationalization of antitrust policy culminating in the creation of an international system of antitrust is in their domestic interests,[113] as well as in their overall best interest.[114] As a matter of fact, this proposition is applicable not only to the US, but also to many other nations, whether developing or developed; though the task is much harder in the case of the former. Politicians are not generally in favour of surrendering power, even to a limited extent, to autonomous institutions in an international system of antitrust.[115] This point can be illustrated with reference to merger control.

Decisions in merger cases often have important political value because they can be employed to impose costs on foreign undertakings or prevent unemployment, which normally accrue from rationalization following mergers.[116] One does not need to go beyond the *Boeing/MDD* case to be able to deduce the political value of mergers approval decisions.[117] Due to the importance of the attitude of politicians and competition regulators, a study on the internationalization of antitrust and an attempt to create an international system of antitrust must be sensitive to *political realities*. In this sense, one can trace the failure of efforts toward internationalization thus far to

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[112] See Gerber, at p 309, note 104 *Ante*.

[113] See generally A. Guzman "Is international antitrust possible" (1998) 73 *N.Y.U.L. Rev.* 1501

[114] See Fiebig, at p 245-6, note 109 *Ante*.

[115] See chapter 5. Chapter 6 also demonstrated how the role of politicians in Member States is influential with regard to the success of EC system of antitrust.

[116] M Coate "Bureaucracy and politics in FTC merger challenges" in F. McChesney & W. Shughart (eds.) *The Causes and Consequences of Antitrust: The Public Choice Perspective* (Chicago, 1995), at p 229; W. Shughart & R. Tollison "The employment consequences of the Sherman & Clayton Acts" (1991) 147 *J. Inst. & Theo. Econ.* 38.

[117] E. Fox "Antitrust regulation across national borders: the United States Boeing versus European Union of Airbus" (1998) 16 *Brookings L.Rev.* 30.

the fact that those efforts have been over-ambitious and neglected to take into account *political realities*.

The whole project of the internationalization of antitrust policy may be reduced to the reaching of consensus on the issue. Of course, it is not sufficient to recognize that the project involves reaching such consensus. One has to go further to determine the need, and moreover the urgency, for this consensus. In this regard, the following quote sounds a keynote:

> "What is the size of the problem? In regard to an international or "global" competition law regime, are we really talking about more than about 500 large corporations operating worldwide? In regard to mergers, are we talking about more than a few mega merger cases in which international antitrust co-operation is really important? However, whatever it is we are talking about, there seems to be a measure of consensus that we should go at a fairly steady pace, in other words, hastening slowly, in addressing the problem of a "global" competition law regime."[118]

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[118] C. Bellamy "How can we harmonize" (1999) 34 *New Eng. L. Rev.* 134

Chapter Eleven

CONCLUSIONS: THE WAY FORWARD

The purpose of the thesis has been to examine the internationalization of antitrust policy and to furnish an account of the law and politics thereof. Each of the previous chapters dealt with a specific set of issues and each chapter was closed with a specific set of conclusions. This chapter presents a summary of the analysis as a whole and offers a glimpse of the future.

The internationalization of antitrust policy has developed with alacrity. With the various developments witnessed throughout the twentieth century, it has become essential to bring this topic under close scrutiny. In particular, the relentless process of globalization has increased the number of antitrust cases with international components. This can be observed in light of how trans-national cartels and international merger cases have come to form an increasingly significant part of the work of antitrust authorities. Not infrequently, such cases involve undertakings and information located in several jurisdictions. This may present hurdles when antitrust authorities seek to enforce their antitrust laws in those cases as well as trigger difficulties when they actually do so. Very often, international antitrust issues can only be effectively addressed through enhanced international co-operation between different antitrust authorities. Such co-operation also provides relief for business undertakings, which may in some cases face excessive costs, in time and money, caused by concurrent antitrust investigations initiated in different jurisdictions.

Effective co-ordination of enforcement between antitrust authorities cannot however be expected to deliver fruitful results unless the antitrust laws of nations are aimed to address practices of undertakings, whether private or hybrid (public/private), which may have anti-competitive effect, especially one capable of preventing foreign undertakings from penetrating domestic markets. Nor can the extra-territorial application of domestic antitrust laws be considered appropriate, if at all effective, in dealing with such behaviour. Extra-territoriality can give rise to disputes between

nations as well as prove ineffective where vital information and evidence is located in foreign jurisdictions.

International antitrust issues in general and those with market access dimension in particular can only be addressed satisfactorily if nations recognize the value of competition and adopt effective antitrust law and policy and enforce them vigorously. The last few decades witnessed an impressive record of removing governmental restrictions to the flows of trade and investment between nations. This has helped identify the extent to which market access by foreign undertakings to domestic markets can be hindered by private anti-competitive behaviour of domestic undertakings. Such situations generate great concern, especially since such behaviour may not only harm the welfare of the state where it occurs, but also threaten the legitimate interests of other nations. The fact that anti-competitive practices of private undertakings may be blessed by governmental ones – creating thus hybrid practices – complicates the situation further. In this case, there is no substitute for an effective enforcement by the nation concerned of its antitrust law. Antitrust policy in this way complements trade policy. It is important both to acknowledge and support this conclusion.

The recent years have witnessed an interesting move on the part of many nations with regard to the role of governments in the global economy. In parallel with the move on the part of many nations away from monopolization and exerting strict control and planning over their domestic economies, systems of antitrust have been introduced as well as reinforced in many nations at all levels of developments. With nearly 90 systems of antitrust world-wide and more than 25 nations actively engaged at present in adopting some form of antitrust law, a clear international consensus, despite certain differences between nations, has been emerging on the need for antitrust law as a vital instrument to protect competition and as an integral part of the domestic reform nations usually undertake in order to integrate in the global economy. This development is important for developed and developing states alike. It also shows that antitrust law has become an issue of vital interest for all states at different levels of development. Hence, international co-operation should involve developed as well as developing states, especially with regard to providing technical assistance by states

with strong systems of antitrust to others where antitrust law is a very young phenomenon, exchange of information and co-ordination in enforcement practices.

By the same token, this development also shows how business undertakings have become important players in the global economy. In light of this, there is a need to devote special attention to the concerns and needs of business undertakings as well as their relationship with sovereign states in the context of the internationalization of antitrust policy.

There is no doubt that these factors enhance the proposal to build global antitrust policy and to facilitate a vigorous antitrust law enforcement with regard to anti-competitive behaviour with an adverse effect on the flows of trade and investment between nations. However, it is essential to shed light on all the elements necessary in order to pursue this and to offer an insightful account on the way forward.

The efforts of nations and their antitrust communities towards the internationalization of antitrust policy thus far have been channelled mainly through the conclusion of bilateral co-operation agreements; convergence and harmonization; proposals for an international antitrust code; and suggestions regarding a multilateral antitrust agreement as a means to develop an international system of antitrust. These four "examples" of the internationalization have been discussed in previous chapters. There is no reason to believe that these examples, albeit their differences, are not fully consistent. It is very true that they differ greatly in terms of how ambitious, realistic and possible the achievement of each example independently is. Nevertheless, they are complementary. This can be observed, for example, in the case of bilateral co-operation and the pluralist approach, furnished by the proposal to create an international system of antitrust.

A pluralist approach toward internationalization would strengthen antitrust law enforcement by all participating nations in the global trading system. It would also foster the conclusion of bilateral agreements among the antitrust authorities in those nations which are willing to engage in closer enforcement co-operation. This has been the experience within the OECD, where the Organization's recommendations on co-operation produced over the years, have provided a solid ground for the conclusion of bilateral agreements between Member Nations. With about 90 antitrust authorities in

the world, it is legitimate to anticipate that building a comprehensive network of bilateral agreements is bound to be a very slow process. This may render the process neither realistic nor effective. There is the possibility that not all antitrust authorities will be able to participate in this network, with the inevitable result that an adequate account would not be taken of the interests and needs of developing states. In this way, at least, a pluralist approach can be expected to complement efforts under bilateral co-operation.

That the bilateral and pluralist approaches are consistent and complement each other can also be observed in the case of EC antitrust law experience. Chapter 6 demonstrated beyond doubt the commitment of the EC to both regional integration and the development of an international system of antitrust. A great part of the EC's efforts towards co-operation in antitrust policy revolves around strengthening EC antitrust law and fostering a consistent, effective application of its provisions in Member States, developing a framework of regional agreements such as Partnership and Co-operation Agreements and Association Agreements with Central and Eastern European Countries and to a certain extent agreements with some Mediterranean countries. The European Commission has also sought to expand and deepen its bilateral co-operation with partners beyond Europe. Agreements have been entered into with several states such as the US, Canada and South Africa. In parallel to these efforts, the Commission has supported the case for reaching a multilateral agreement in antitrust policy. Over the years, the Commission has made it clear that it is convinced that bilateral agreements, however, are not sufficient to meet all the concerns raised by globalization, adding that a comprehensive multilateral agreement is vital if nations are to reap the benefits of greater trade liberalization.

Nevertheless, it ought to be acknowledged that a transformation of a pluralist approach – which the EC and other nations support – from a proposal on paper to one put into practice is bound to face severe objections from some nations, especially the US. The view held on the other side of the Atlantic is that it is not desirable at present to pursue any pluralist approach, which may lead to the creation of an international system of antitrust. There is a particular US objection to concluding a multilateral agreement within the WTO. According to the US, the WTO option suffers from both institutional and policy difficulties. The US is sceptical over whether nations enjoy

the necessary experience and knowledge. Furthermore, the US is against any proposal which would threaten its sovereignty and usurp its prerogatives in antitrust policy. Instead, it has proposed that nations work on consensus building, through encouraging links between antitrust authorities where views can be exchanged and technical assistance can be offered to nations at an early stage of developing antitrust law. The US seems to be in favour of pursuing this within a forum similar to that of the OECD.

It is important to be aware that this scepticism is likely to affect efforts towards global antitrust policy. However, this does not mean that one should not attempt to support these efforts, especially reaching a multilateral agreement within the WTO. The WTO is very inclusive in its membership, combining both developed and developing states. The fact that there is a close nexus between the WTO objectives of trade liberalization and the commitment of an increasing number of nations – most of whom are WTO participants – to effective antitrust law enforcement is another factor in favour of developing such an agreement under the auspices of the WTO.[1] Furthermore, it seems that currently there are bright prospects for other important international organizations to support the WTO. One such organization is the World Bank, which is believed could provide "fire-power" to the WTO. This is especially important since the World Bank is willing to devote its research capabilities to supporting the WTO.[2]

It is crucial to warn however that such an agreement should be based on realistic aims. Policy-makers, economists and lawyers – judges, practitioners and academics – should remain aware of the *sensitivity* of this area, where a delicate balance needs to be struck between diverse forces: states and undertakings, developed and developing states, states and international organizations and to an extent between antitrust authorities and law courts.

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[1] Note the precedent of the Trade Related Aspects of Intellectual Property (TRIPS) at the WTO. By incorporating IP provisions within the WTO, there is no reason in principle why the WTO should be viewed as a trade-only organization. Furthermore, when analyzing GATT Article I on "Most-Favoured Nation" (MFN) principle and Article III on "National Treatment", when assessing the likeness or substitutability of products, the WTO panels and Appellate Body (AB) are already adept at using market definition e.g. cross-price elasticity analysis. Hence, they should be competent to handle the application of antitrust rules.

[2] See remarks by N. Stern, the chief economist of the World Bank "Bright prospects seen for new trade round", Financial Times (January 30, 2001).

The following recommendations, which are fundamentally different from various recommendations produced by different bodies over the years,[3] can be used as guidelines in order to ensure that this is achieved and to guarantee that any agreement contemplated is fair and workable with regard to the interests and needs of all parties.

1. It is recommended that nations create a Global Antitrust Framework (GAF), preferably under the auspices of the WTO.
2. It is recommended that GAF should include a principle on the binding commitment of nations to introduce antitrust law in their domestic legal systems. In this way, nations, especially those with economies in transition, will be able to develop antitrust laws to suit their own legal, economic and political conditions, as opposed to parachuting in antitrust laws. Nations with strong systems of antitrust have an important role to play, where they can provide technical assistance on how antitrust systems can be developed. It is essential that transitional periods be introduced, in order to cater for the needs of nations at different levels of development.
3. GAF should require nations to adapt their domestic antitrust laws and enforcement mechanisms to the agreed rules under GAF. It is recommended that private undertakings do not have a direct right of action before the body responsible under GAF.
4. It is essential to include principles of non-discrimination and transparency under GAF. The first principle has become of central significance in the global trading system. The principle can be useful in antitrust policy, insofar as there would be a commitment to extend progressively antitrust law to all sectors of domestic economies and apply the law in the same manner to all undertakings, public and private, domestic and foreign.

   The transparency principle, on the other hand, is useful to ensure that antitrust enforcement is effective and non-discriminatory. It ensures both openness in the decision-making of antitrust authorities and adequate control of the exercise of discretion by those authorities. To this end, there is a need for the availability of direct actions by interested parties against antitrust authorities before the courts. By the same token, there is a need for a guarantee that undertakings enjoy a protection of confidential information submitted by them to antitrust authorities.

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[3] See chapter 10 for a discussion on these recommendations.

5. GAF should facilitate co-operation procedures among antitrust authorities. It is recommended that it enhance the use of principles of "positive comity", "traditional comity" and information sharing in general. The inclusion of such principles, on a non-binding basis, is bound to lead to market access issues being addressed effectively.[4]
6. GAF should not aim to force on nations convergence and harmonization of their antitrust laws. Convergence of the substantive provisions of the antitrust laws of nations may not be very effective, or realistic. Furthermore, convergence of the goals of antitrust law can lead to goals advocated by some nations prevailing over goals advocated by other nations. However, convergence can be used in order to identify those issues that require immediate attention and build consensus among nations with respect to how can these be addressed.
7. It is recommended that GAF include a dispute settlement procedure in order to address differences, which may arise between nations individually. However, the procedure should not extend to a review of antitrust cases on a case by case basis.[5]
8. Within GAF, nations should be encouraged to substitute the use of extra-territoriality with the offer of technical assistance to one another and reliance on co-operation.

In this respect, at least, reaching a multilateral agreement on antitrust policy is both desirable and possible. An agreement based on these principles cannot be regarded as a real threat to the sovereignty of nations. It is true that the agreement would call for some limitation on the sovereignty of nations. However, this should be regarded as understandable and acceptable in light of the benefits which nations will be able to reap through opting for the conclusion of a multilateral agreement. Building such an agreement within the WTO in particular can ensure a wider consensus among nations

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[4] Support for this can be found in the case law of the AB of the WTO. The AB insists on the least restrictive trade measures being adopted and accordingly on the primacy of multilateral negotiations and co-operation. See the *Gasoline* (available at http://www.wto.org/english/tratop_e/envir_e/edis07_e.htm) and *Shrimp-turtle* (available at http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm) cases.

Also, the case law of the AB has introduced an unarticulated doctrine of proportionality, which would be an important "selling-point" for advocating GAF since it would maximize market access and ensure unnecessary burdens on trade and competition are avoided.

[5] If GAF is adopted within the WTO, then it would be desirable to introduce an amendment to The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which is

as well as complement trade policy objectives, which are already pursued within the WTO. This will enhance the flows of trade and investments between nations as well as expand the way forward by facilitating more and better globalization and supporting the desirability of further internationalization.

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covered under Annex 2 to the WTO Agreement, to allow antitrust lawyers to sit on panels and on the AB, in addition to international trade lawyers.

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4. Canada Competition Bureau

http://strategis.ic.gc.ca

5. Canada University of British Columbia competition site

http://csgb.ubc.ca/ccpp

6. Canadian Bar Association, Competition

http://www.algonquinc.on.ca/cba

7. EC Commission, the Competition Directorate

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